



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

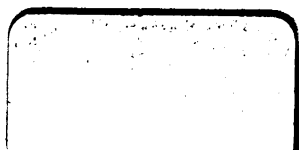
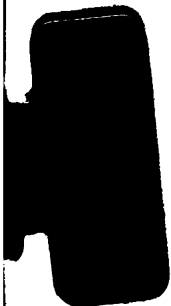
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



AD
AWC
YDs
copy 1

James H. H. H.

September 1908.

THE STUDY OF CASES.

To accompany this volume.

CASES FOR ANALYSIS. Materials for Practice in Reading and Stating Reported Cases, Composing Head-Notes and Briefs, Criticising and Comparing Authorities, and Compiling Digests. By EUGENE WAMBAUGH, LL. D.

THE
STUDY OF CASES.

A COURSE OF INSTRUCTION

IN READING AND STATING REPORTED CASES,
COMPOSING HEAD-NOTES AND BRIEFS,
CRITICISING AND COMPARING AUTHORITIES,
AND COMPILING DIGESTS.

BY

EUGENE WAMBAUGH, LL.D.,

PROFESSOR OF LAW IN HARVARD UNIVERSITY.

SECOND EDITION.

BOSTON:

LITTLE, BROWN, AND COMPANY.

1894.

Copyright, 1892, 1894,
BY EUGENE WAMBAUGH.

University Press :
JOHN WILSON AND SON, CAMBRIDGE, U. S. A.

TO

ONE WHOM AN APT DESCRIPTION HAS CALLED

"VIRUM INDOLE LIBERALI, INGENIO ACUTO, USU RERUM MULTISQUE LITTERIS CULTUM, JURISPRUDENTIAE APUD NOS PROFESSOREM, IN DISSERENDO FACUNDUM, IN SCRIBENDO LUCULENTUM, IN UTROQUE INGENIOSUM ATQUE SANUM," —

TO

JAMES BRADLEY THAYER, LL.D.,

Weld Professor of Law in Harvard University,

This Volume is Dedicated

BY A PUPIL AND COLLEAGUE.

PREFACE TO THE FIRST EDITION.

THE aim of this volume is to teach students the methods by which lawyers detect *dicta* and determine the pertinence and weight of reported cases. The most important points as to those methods are explained in the general view with which the volume opens. As the methods cannot be mastered without practice, the remainder of the volume is devoted to cases for study. The intention is that the student shall state the cases, discover the doctrines of law established by them, compose head-notes, point out *dicta*, make all possible comments as to the weight of the decisions, and compile a digest. Simple cases have been placed near the beginning of the volume, and an attempt has been made to lead the student by easy steps to the rather difficult cases with which the volume closes. Without material departure from that plan, the cases on related points of law have been placed together and have been arranged chronologically; and thus the student has been aided to compare cases and to trace the growth of law.

January 15, 1892.

PREFACE TO THE SECOND EDITION.

IN the preface to the first edition it was explained that the aim of the volume is to teach students the methods by which lawyers detect *dicta* and determine the pertinence and weight of reported cases, and that the plan includes both a general statement of the methods pursued by lawyers and a collection of cases intended to serve as material for experiments by the student. In the second edition that aim is retained, and the same plan of combining a theoretical statement with practice is pursued; but to the original plan is now added an attempt to teach by example. Accordingly, an attempt is now made to present for study cases that not only afford suitable material for the beginner's experiments in detecting *dicta*, framing head-notes, and comparing and criticising authorities, but also afford, in the arguments of counsel or in the opinions of the judges, suggestive illustrations of the way in which skilled persons perform this same work. Further, in the theoretical chapters the text is now illustrated by inserting in the foot-notes quotations, ancient and modern, showing the point

PREFACE.

of view from which English and American lawyers have always regarded precedent.

For use in a more extended course, a companion volume has been prepared, entitled *Cases for Analysis*, which contains nothing but cases, and presents among many others the cases given in the first edition of *The Study of Cases*. To prevent possible confusion, it seems necessary to explain the respective fields of the two volumes. *The Study of Cases* is intended solely to give training in the methods of using authorities; and in preparing the introductory text and in selecting and annotating the cases, no attempt has been made to give prominence to the doctrines of any one branch of law. *Cases for Analysis*, on the other hand, though having for its principal purpose training in the methods of using authorities, is composed of cases selected and annotated in such a manner as to serve, if so desired, as helps in a course of study partly devoted to the mastery of elementary topics in Contracts or in Torts. Thus the volumes differ in detail; and yet each of them is intended to aid the beginner to lay a foundation for thorough knowledge of the ways in which reported cases are to be discovered, summarized, combined, attacked, supported, and otherwise utilized for the purposes of the practical lawyer. Each volume is complete in itself. If both volumes are used, it is practicable to use them simultaneously or to cause either one of them to precede the other; but it is preferable to begin with *Cases for Analysis*,

PREFACE.

especially if the student has an instructor's aid, for the use of that collection will give the beginner the greater amount of actual practice with cases and will tend to prevent his laying too great stress upon the mere reading of the theoretical and didactic matter that necessarily finds place in the first book of *The Study of Cases*.

October 31, 1894.

TABLE OF CONTENTS.

BOOK I.

GENERAL VIEW.

CHAPTER I.

PRELIMINARY TOPICS.

	PAGE
§ 1. The Purpose of the Volume: Law and Fact: Reports as distinguished from Trials	1
2. The Purpose of the General View or Summary	4
3. The Way to use the Cases: Reading and Stating Cases: Writing Head-Notes: Comparing Cases: Compiling a Digest	5

CHAPTER II.

HOW TO FIND THE DOCTRINE OF A CASE.

§ 4. Ascertaining the Doctrine	8
1. THE COURT'S DUTY TO CONSIDER THE ACTUAL CASE.	
§ 5. First Principle: The Court's Duty to decide the very Case: Hypothetical Cases	8
6. Difficulty that two Cases are never identical	14
2. THE NECESSITY OF UNIFORMITY.	
§ 7. Second Principle: The Court's Duty to follow a general Rule	15
8. The consequent Necessity for eliminating unessential Circumstances	15
9. At least four Propositions involved in every Case	16

TABLE OF CONTENTS.

	PAGE
§ 10. Difficult to discriminate between essential and unessential Circumstances	16
11. A Test for determining whether a Case is a Precedent for a given Doctrine	17
12. An indispensable Mark of the Doctrine of a Case	18
3. THE WORDS OF THE COURT.	
§ 13. The Opinions of the Judges: <i>Dicta</i> and their Weight	18
14. Weight of Words expressing the strict Doctrine of a Case	19
15. Inability of the Court to make an unnecessary Proposition the Doctrine of a Case	23
16. Third Principle: The very Words of the Court not the Doctrine of the Case	24
4. THE EFFECT OF THE COURT'S IGNORING POSSIBLE DOCTRINES.	
§ 17. Fourth Principle: Doctrine in the Mind of the Court: Necessity for Deliberation: Familiar Doctrines often not expressed: Extraordinary Circumstances: General Language	24
18. Power of the Court to prevent the Deducing of Doctrines	28
19. Consequent Necessity for an Examination of the Opinion	28
20. Summary: The Four Keys to the Discovery of the Doctrine of a Case	29
21. The Marks essential to the Doctrine of a Case	29

CHAPTER III.

CASES INVOLVING SEVERAL QUESTIONS.

§ 22. Cases involving more than one Doctrine: Dependent Propositions	30
23. Independent Propositions: Case involving two or more separate Questions	31
24. Several Questions brought to the Court: Lower Court sustained	31
25. Several questions brought to the Court: Lower Court reversed	32
26. Summary	33

CHAPTER IV.

HOW TO WRITE A HEAD-NOTE.

§ 27. The Authorship and Weight of Head-Notes	35
28. Head-Notes stating several Doctrines	36

TABLE OF CONTENTS.

	PAGE
§ 29. Head-Notes of the long Form: <i>Dicta</i> : Catch-Words	36
30. Head-Notes of intermediate Form	36
31. Head-Notes of the short Form: Objection to them	37
32. Other Forms: Different Forms for different Cases	37
33. Examples	39
34. The Value of Skill in preparing Head-Notes	41

CHAPTER V.

HOW TO CRITICISE CASES.

§ 35. Importance of Criticism	42
36. Many Grounds: Objections not of same Weight	42

I. THE NATURE OF THE REPORT.

§ 37. Unreported Cases	43
38. Newspaper Reports	43
39. Reports of low Standing	45
40. Inharmonious Reports	45
41. Scanty Reports	46

2. THE ARGUMENTS OF COUNSEL.

§ 42. Thoroughness of Argument	46
--	----

3. THE OPINION.

§ 43. No Reasons: No Citations	47
44. Brevity	47
45. <i>Per Curiam</i>	47
46. Court's Opinion by dissenting Judge	48
47. Divided Court	48
48. Judges concurring in Result but not in Reasoning	50
49. Unconscious Overrulings	50
50. Failure to notice contrary Decisions in Other Jurisdictions	50
51. Relying upon misunderstood or overruled Cases	51
52. Relying upon unsustained Text-Books	52
53. Inartistic Reasoning: <i>Stare Decisis</i>	52
54. Local Law	53
55. <i>Dictum</i>	53
56. Going off on another Point: Several Points	54
57. A Point not argued and not perceived	55
58. Other Objections: Precise Point: General Language: Distinguishing Cases	55
59. Weight of a criticised Opinion: Home and other Jurisdictions	56

TABLE OF CONTENTS.

	PAGE
4. THE NATURE OF THE QUESTION.	
§ 60. Case of first Impression	56
61. Peculiar Circumstances: Politics	57
62. <i>Ex Parte</i>	61
5. THE COURT.	
§ 63. Lower Courts	62
64. Some Courts not highly esteemed: Unusual Question: Remote Jurisdictions	63
65. Reversed: Courts often granting Rehearings.	64
6. SUBSEQUENT STATE OF THE LAW.	
§ 66. Overruled	64
67. Obsolete	65
68. Not followed	66

CHAPTER VI.

COMBINING AND COMPARING CASES.

§ 69. When Combination and Comparison of Cases must be undertaken	67
70. The Method of combining Cases	67
71. Combinations made unconsciously	68
72. Hypothesis: Comparison	69

CHAPTER VII.

THE GROWTH OF LEGAL DOCTRINE.

§ 73. Applying established Doctrines	73
74. New Doctrines needed.	73
75. The Law grows	74
76. Does Law grow by judicial Legislation?	74
77. The Lawyers' View	75
78. The analytical Jurists' View	77
79. Neither View essential.	80

CHAPTER VIII.

THE IMPORTANCE OF THE UNWRITTEN LAW.

§ 80. The Bulkiness of the unwritten Law	81
81. The Importance of the unwritten Law	82
82. Unwritten Law supplementing written Law	83
83. Codification: Continued Need of Case Law	86
84. Summary	90

TABLE OF CONTENTS.

CHAPTER IX.

THE RESPECT FOR AUTHORITY.

	PAGE
§ 85. The Degrees and Kinds of Authoritativeness	95
86. Imperative Authority	95
87. The Justification for Imperative Authority	96
88. Persuasive Authority	98
89. The Justification for Persuasive Authority	100
90. Distinction between Imperative and Persuasive Authority: Illustrations	100
91. Quasi-Authority	102
92. The Justification for Quasi-Authority	103
93. <i>Stare Decisis</i>	104
94. The Power to Overrule	105
95. The Conflict	106
96. The Result	108
97. Utility of classifying the Kinds of Authority	109

CHAPTER X.

REPORTS.

§ 98. The earliest Reports	110
99. The Reporter's Aim	116
100. The Selection of Cases	117
101. The Titles of Cases	119
102. The Head-Notes	120
103. The Statements	120
104. The Arguments	121
105. The Opinions	122
106. The Opinions, continued: Majority Opinions	122
107. The Opinions, continued: Dissenting Opinions	125
108. The Judgments, or other Results of the Litigation	125
109. Official Reports	126

CHAPTER XI.

DIGESTS.

§ 110. The Abridgments	128
111. The English Digests	129
112. The American Digests	129
113. Special Digests	130
114. The Plan of a Digest	130
115. Classification	130
116. The Form of the Paragraphs	131
117. The Order of the Paragraphs	132
118. Other Details	132

TABLE OF CONTENTS.

CHAPTER XII.

BRIEFS.

	PAGE
§ 119. Briefs in England and in America	134
120. The Statement	134
121. The Questions	135
122. The Argument: Independent Arguments	135
123. The Argument, continued: A Chain of Propositions	136
124. The Argument, continued: Familiar Law	136
125. The Argument, continued: The Order of Propositions	137
126. The Argument, continued: The Support of Propositions	137
127. The Argument, continued: Attacking the Adversary	138
128. Finding Authorities	138
129. Abstracting Authorities	139
130. Selecting Authorities	140
131. Revision: Summing up	141

BOOK II.

CASES FOR STUDY.

CASE 1.— State <i>v.</i> Baughman	142
CASE 2.— Houston <i>v.</i> Williams	148
CASE 3.— Webb <i>v.</i> Bell	153
CASE 4.— Simpson <i>v.</i> Hartopp	154
CASE 5.— Storey <i>v.</i> Robinson	160
CASE 6.— Buchner <i>v.</i> C., M. & N. W. Ry.	161
CASE 7.— Miller <i>v.</i> Race	175
CASE 8.— Gibbon <i>v.</i> Paynton	185
CASE 9.— Tinkler <i>v.</i> Poole	190
CASE 10.— Forward <i>v.</i> Pittard	193
CASE 11.— Burke <i>v.</i> Jones	202
CASE 12.— Hilliard <i>v.</i> Richardson	216
CASE 13.— <i>In re</i> Walker	236
CASE 14.— Callender <i>v.</i> Keystone Mutual Life Insurance Co.	246
CASE 15.— Towle <i>v.</i> Forney	253
CASE 16.— Gelpcke <i>v.</i> Dubuque	260
CASE 17.— Farrior <i>v.</i> New England Mortgage Co.	308

APPENDIX I. REGNAL YEARS	317
APPENDIX II. TERMS OF COURT	319
APPENDIX III. ABBREVIATIONS	321
INDEX	325

TABLE OF CASES.

	PAGE		PAGE
Adams <i>v.</i> Lindsell	66	Commonwealth <i>v.</i> Hartnett	78
Alexandra, The	44	Cooke <i>v.</i> Eshelby	35
Aud <i>v.</i> Magruder	252		
Baltimore & Ohio Railroad Co. <i>v.</i> Baugh	102	Dalby <i>v.</i> India and London Life Assurance Co.	66
Baltimore & Ohio Railroad Co. <i>v.</i> Kent	119	Dartmouth College <i>v.</i> Wood- ward	57
Beamish <i>v.</i> Beamish	49, 101	Detroit <i>v.</i> Detroit City Ry. Co.	59
Beckham <i>v.</i> Drake	10	Dimes <i>v.</i> Junction Canal	60
Bole <i>v.</i> Horton	42, 53	District Attorneys, <i>In re</i>	13
Boteler <i>v.</i> Allington	61	Dodge & Stevenson Mfg. Co., <i>In re</i>	61
Brett <i>v.</i> Rigden	21	Doe <i>v.</i> Hicks	61
Brookes and Earl of Rivers, <i>In- ter</i>	61	Dubuque <i>v.</i> Illinois Central R. Co.	22, 49, 50
Buchner <i>v.</i> C., M. & N. W. Ry.	19, 161	Durant <i>v.</i> Essex County	49
Burgess <i>v.</i> Seligman	102, 308		
Burke <i>v.</i> Jones	42, 202	Eustis <i>v.</i> Bolles	55
Butler <i>v.</i> Duncomb	104	Evans' Case	53
Butler <i>v.</i> Van Wyck	105		
Cage <i>v.</i> Acton	22	Farrington <i>v.</i> Knightly	104
Caledonian Railway Co. <i>v.</i> Walk- er's Trustees	101	Farrior <i>v.</i> New England Mort- gage Security Co.	78, 308
Callender <i>v.</i> Keystone Mutual Life Ins. Co.	246	Fisher <i>v.</i> Prince	22
Card <i>v.</i> Hope	56	Fletcher <i>v.</i> Sondes	82
Carroll <i>v.</i> Carroll's Lessee	17	Forward <i>v.</i> Pittard	193
Chandos <i>v.</i> Talbot	104	Fougue <i>v.</i> Burgess	39
Clark <i>v.</i> Thomas	34	Fouts <i>v.</i> The State	26
Clarke <i>v.</i> Western Assurance Co.	48, 51		
Cohens <i>v.</i> Virginia	19, 27	Gelpcke <i>v.</i> Dubuque	78, 260
		German Nat. Bank <i>v.</i> Nat. State Bank	65
		Gerrard <i>v.</i> Gerrard	104
		Gibbon <i>v.</i> Paynton	185

TABLE OF CASES.

	PAGE		PAGE
Gifford v. Livingston	252	Rayner v. Mowbray	104
Gillet v. Phillips	47	Regina v. Ramsey	42
Godsall v. Boldero	66	Reniger v. Fogossa	21
Goodright v. Rich	62	Richardson v. Mellish	27, 55
Goodright v. Wright	104	Rohrbach v. Germania F. Ins.	
Greaves v. Maddison	104	Co.	19
Griffiths, <i>Ex parte</i>	153	Rotch v. Edie	63
Harrow v. Myers	253	Royal Ins. Co. v. Roedel	48
Henderson v. Folkestone Water-		Rumsey v. N. Y. & N. E. R. R.	
works Co.	315	Co.	51
Hilliard v. Richardson	42, 216	Rutland v. Rutland	104
Holliday v. Brown	35	Scaramanga v. Stamp	100
Houston v. Williams	20, 148	Scott v. Sandford	10
Howard v. Albany Ins. Co.	48	Senate, Matter of the Applica-	
Howard Ins. Co. v. Scribner	51	tion of the	148
Insurance Co. v. Mosley	42	Shaw v. G. W. R. Co.	55
Justices, Answer of the (148		Sheffield Banking Co. v. Clay-	
Mass. 623)	13	ton	236
(150 Mass. 598)	13	Simpson v. Hartopp	154
Justices, Opinion of the (5 Met.		Sloat v. Insurance Co.	51
596)	13	Speight v. People	153
(126 Mass. 557)	13	State v. Baughman	8, 13, 142
Kent v. Railroad Co.	119	State v. Clarke	19
King v. Hoare	99	State v. Pugh	10, 26, 64
Leavitt v. Blatchford	42, 47, 106	Storey v. Robinson	160
Miller v. Miller	48	Swift v. Tyson	102
Miller v. Race	175	Taylor's Adm'r v. Spindle	42
Mirehouse v. Rennell	76	Thorp v. Thorp	45
Moore v. The State	26	Tinkler v. Poole	190
Morse v. Goold	49	Towle v. Forney	253
Murdock v. City of Memphis	54	United States v. Coolidge	47
Nordenfelt v. Nordenfelt	39	United States v. Hudson	47
Ogden v. Insurance Co.	51	Vaughn v. Harp	153
Osborne v. Morgan	45	Vyse v. Wakefield	50
Pearce v. Atwood	60	Walker, <i>In re</i>	236
Peck v. Freeholders	60	Walker v. Cincinnati	64
Pole v. Fitzgerald	58	Webb v. Bell	153
Price v. Easton	50	Woodruff v. Parham	56
Priority of Legislative Appro-		Woodruff v. Woodruff	78, 315
priations, <i>In re</i>	13	Wright v. Nagle	28
Queen v. Hepburn	57	Y. B. 11 H. IV. 37 a.	46
		Young Ah Gow, <i>Ex parte</i>	56

THE STUDY OF CASES.

BOOK I.

GENERAL VIEW.

CHAPTER I.

PRELIMINARY TOPICS.

§ 1. The Purpose of the Volume: Law and Fact: Reports as distinguished from Trials.

This volume is intended to be used by law students as a means of learning by practice, rather than by precept, how reported cases should be read, digested, criticised, and compared. By actually studying cases, and not by reading about the proper way of studying them, one best learns how they ought to be treated. Hence the student is urged to plunge promptly into the cases printed in the second book, or into some other collection of cases for students.¹ The

¹ The cases in the second book are chiefly cases in which the topics found in the first book are discussed by counsel or the court. In a companion volume, entitled *Cases for Analysis*, are gathered cases turning chiefly on points in Contracts or in Torts, and giving occasion to put into practice the matter of this volume. With *Cases for Analysis*, rather than with the cases in the second book of this volume, should begin the work of the student who intends to pursue the study of cases thoroughly, or who wishes the study of cases to supplement a text-book course in Contracts or in Torts.

only part of the volume intended to be read by the student before he studies his first case is this preliminary chapter.

Undoubtedly the beginner well **knows** that a volume of law reports gives accounts of actual litigation; but he may not know why a volume of law reports differs so vastly from accounts of the same litigation contained in newspapers. The difference between these two sorts of accounts results largely from the distinction between law and fact, — a distinction not always easy to take, but nevertheless in the main obvious enough. A question of fact asks whether certain events have happened.¹ A question of law asks whether from the happening of certain events there result rights

¹ Facts include both physical and mental phenomena. Physical phenomena, e. g. the presence, color, and size of objects, are cognizable by the senses; but mental phenomena, e. g. knowledge or intention, are directly cognizable by consciousness only, and hence by persons not experiencing them must be indirectly inferred from reasoning upon physical phenomena conceived to be causes, accompaniments, or effects of such mental phenomena. Even some physical phenomena are not actually perceived by the senses, but are inferred from other physical phenomena. For example, when X says that he saw Y kill Z, X really means that he saw Y point a gun towards Z, and that he heard a discharge, and that he saw Z fall dead, and that Y's acts were the only apparent cause of Z's death, and that consequently X believes Y killed Z; and that this is not perception but is inference is obvious enough when one reflects that a person ignorant of firearms would give a very different account of the transaction. So, too, when the question is whether certain conduct is negligent, the standard assumed for comparison, the care taken by a man of ordinary prudence, is obviously an intricate conception not derived from one perception of phenomena. *Vaughan v. Menlove*, 3 Bing. N. C. 468, 475 (1837), *per* Tindal, C. J.; *Commonwealth v. Pierce*, 138 Mass. 165, 176 (1884), *per* Holmes, J.; *Holland's Jurisprudence* (6th ed.), 98-101. Negligence, it should be noticed, is not a mental state, save in a negative sense, the sense, namely, in which it is conceived as excluding an active intention to do a wrongful act. *Holland's Jurisprudence* (6th ed.), 97-101; *Markby's Elements of Law*, §§ 225-230, 680-685.

which a court will recognize or enforce.¹ A law, in short, is a rule to the effect that when facts of a certain nature exist the courts will recognize or enforce certain rights and liabilities.

Further, a fact, an event, occurs but once ; but a law, a rule, reappears upon innumerable occasions. That an event has happened is slight indication that a similar event will happen again ; and if a similar event does happen, still it is merely a similar event, and not the same one. On the other hand, that a rule of law has been applied once is an indication both that there is such a rule, and that when similar facts arise the same rule, not a somewhat similar one, will be applied.

To the public, the minute details of the facts shown by the evidence, even the very words and appearance of witnesses, and of counsel and of judges, may be of interest, because strange or dramatic ; and to this public interest the newspapers appeal. To lawyers, however, at least after the case is decided, almost the sole interest of the case resides in the points of law, the facts ceasing to be important save in so far as they present problems for the application of rules ; and therefore the law reports give simply such an account of litigation as will indicate what problems of law arose and what rules were applied.² Sometimes, it is true, the facts of a case are so novel and interesting as to cause it to become a *cause célèbre*, or the examination of witnesses is conducted with peculiar skill, or the addresses of counsel are extraordinarily striking ; and then even lawyers wish a permanent account similar to the one contained in a newspaper, the result being an account termed a trial, usually containing a transcript, word for word, of the questions addressed to witnesses, their answers, the addresses by

¹ J. B. Thayer, "Law and Fact," 4 Harvard Law Rev. 147 (1890); largely reprinted in Thayer's Cases on Evidence, 143-154.

² See § 99.

counsel, and the judge's charge to the jury; but the volumes of trials are comparatively few and are seldom used.¹

A report of a case usually consists of six parts: (1) the title of the case, which title usually contains the names of the parties;² (2) a head-note or syllabus, in which the reporter, or sometimes a judge of the court, indicates the point of law for which the case is by him considered to be an authority;³ (3) a statement, usually by the reporter, but sometimes by a judge, of the nature of the litigation and the manner in which the case reached the court whose action is reported, including as elaborate an account of the pleadings and of the evidence as may be necessary in order to show what question was presented to that court;⁴ (4) an abstract of the arguments of counsel;⁵ (5) the opinions of the judges;⁶ (6) a memorandum of the disposition made of the case in that court.⁷

§ 2. The Purpose of the General View or Summary.

Although many rules of pleading and procedure attempt to bring about a separation of questions of law from questions of fact,⁸ and although the opinions of the judges and the

¹ The most famous collection of trials is the series containing English trials for treason and the like, entitled *Howell's State Trials*.

² See § 101. When a title is written or printed, the usual form is — (the plaintiff) *v.* — (the defendant). This is usually read as — against —.

³ See §§ 27-33, 102.

⁴ See § 103.

⁵ See § 104.

⁶ See §§ 105-107.

⁷ See § 108. This memorandum is usually printed in italics at the very end of the case.

⁸ In procedure at law, as distinguished from procedure in equity, the most usual methods of originally raising questions of law and separating them from questions of fact are these: —

(1) Demurrer.

(2) Objections to the admissibility of evidence.

labors of the reporter give great assistance in determining the point of law decided, it must not be inferred that it is always easy to discover the proposition of law for which a reported case is authority, nor the weight of the case. Many reported cases are difficult to analyze, and all must be examined with care. The method of determining the doctrine and the weight of a case may appear easy when mastered ; but it cannot be mastered without attentive study, and hence this volume has been prepared as an aid. The first book gives a general view of the subject. The student may find it to his advantage to refer to the first book from time to time, but he will do well to postpone the consecutive reading of it until he has studied the cases, for by studying the cases with the aid of a competent teacher he will most easily and most thoroughly master the principles of which the first book is a mere summary.

§ 3. The Way to use the Cases: Reading and Stating Cases: Writing Head-Notes: Comparing Cases: Compiling a Digest.

/- The student should begin by reading the first case rather rapidly from end to end, his purpose being to get a general

(3) Motion for a nonsuit; or demurrer to the evidence; or motion to take the case from the jury by means of a peremptory instruction to find for one party or for the other. *Smith's Action at Law*, (12th ed.) 137-139; 2 *Thompson on Trials*, §§ 2245-2271.

(4) Objections to the charge.

(5) Special verdict. 3 *Bl. Com.* 377.

(6) Agreed statement of facts.

(7) Motion for new trial.

(8) Motion for judgment *non obstante veredicto*, or motion in arrest of judgment.

(9) Writ of error. 3 *Bl. Com.* 406-411.

The third, sixth, and seventh methods do not always prevent discussions as to weight of evidence; and, indeed, the first, eighth, and ninth methods are the only ones that invariably present merely questions of law. By adopting the appropriate procedure, a question of law raised by any method may be taken to a higher court.

- idea of the purport of the case. He should then read the case again, looking up in a law dictionary or elsewhere the meaning of all abbreviations, technical words, and obscure expressions, and not stopping until he is sure that he understands the whole case. This does not mean that the student is to stop upon each sentence until he understands it. It is not necessary or right to attempt to understand each sentence by itself. Sentences are not written in that way. Each sentence lies in the writer's mind as part of a context; and as the writer views each sentence in connection with what goes before and after, the reader should do likewise. By taking sentences in their natural connection with one another and by keeping in mind the subject under discussion, the case can be mastered even though there remain an obscure sentence here and there. The chief things the student seeks are the points presented to the court whose opinion is reported, and the propositions of law for which the decision is authority. Having made up his mind as to these matters, the student should next, with the book open before him, make a brief oral statement of the case, omitting none of those facts as to the pleadings, the evidence, or the procedure, which may be necessary to show what the points were and how they came before the court whose opinion is reported, and in conclusion he should give the result and the reasons upon which the court relied. He should then write a head-note containing the points of law for which the decision is authority, omitting *dicta*.¹ He

¹ See §§ 28-33.

"The student would find it an admirable exercise to endeavor to frame his own marginal abstract of a case, and then compare it with that of the reporter. A little practice of this kind would soon enable him to detect the points of a case, — to seize upon its true bearings; and this . . . is one of the most distinguishing characteristics of what may be termed a legal or judicial mind." Warren's Law Studies (3d ed). 1307. See also Sir Matthew Hale's preface to Rolle's

should test the accuracy of his head-note in every possible way, attacking it as an enemy might.¹ Finally, he should consider whether the decision is right, and whether it conflicts with other decisions to which he has access.

After treating all the cases in this way, the student will be in a position to systematize his knowledge regarding the study of cases by reading the first book.

Last of all, the student should make a digest of the cases.²

Abridgment; Bishop's First Book of the Law, § 392; Reed's American Law Studies, § 246.

"An uncoded system of law can be mastered only by the student whose scientific equipment enables him to cut a path for himself through the tangled growth of enactment and precedent, and so to codify for his own purposes." Holland's Jurisprudence, (6th ed.) 1.

¹ See §§ 4-33.

² See §§ 34, 114-118.

CHAPTER II.

HOW TO FIND THE DOCTRINE OF A CASE.

§ 4. **Ascertaining the Doctrine.**

The ascertaining of the proposition of law for which a decision is authority is one of the most important investigations that can be undertaken regarding a reported case. The discussion of cases that involve two or more questions of law will be postponed until the next chapter. This chapter will be devoted principally to cases turning upon one point, and, as the discussion will necessarily be long, the chapter will be divided into four parts.

1. *The court's duty to consider the actual case.*§ 5. **First Principle : the Court's Duty to decide the very Case : Hypothetical Cases.**

The first key to the discovery of the doctrine of a case is found in the principle that the court making the decision is under a duty to decide the very case presented and has no authority to decide any other.¹ No court can refuse to decide an actual case over which it has jurisdiction ; and no court can decide a wholly imaginary case. Nor can a court decide a case partly imaginary. The court, for example, cannot elect to disregard some of the features of the actual case and to base its decision upon the remaining features. If, however, the court finds that some one material error has been committed by the court below, or finds that there is some other one point upon which, taken by itself, the deci-

¹ *State v. Baughman*, 38 Ohio St., 455, 459 (1882), s. c. *infra*.

sion can properly rest, the court need not pass upon other points; and in such circumstances the court, although it apparently refuses to go into the whole case, really ignores no part that is material, but simply declines to enter upon unnecessary discussion. To put the matter in another form, the court's purpose is a practical one, namely, to decide what disposition should be made of the case brought before it, the question often being, for example, simply whether there must be a new trial; and as the court's duty is measured by this practical purpose, the court's duty is to consider the whole case to the extent, and only to the extent, requisite in order to decide what it ought to do; and when the court has found one reason that clearly indicates what the court must do, it is not the duty of the court to search for still another reason upon which to base the decision;¹ for

¹ "I quite agree with the statement of the counsel for the defendant, that in giving our judgment for the plaintiff, we must be taken to disagree entirely from the opinion expressed by the Court of Common Pleas in the action between the same parties, and which was afterwards brought before the Court of Error. Perhaps it is unfortunate that in every case each particular point mooted at the bar is not decided by the Court; much litigation would probably be avoided by it. It was formerly very much the practice of courts of justice to go out of the particular question, and determine every point which had arisen in the case. But in modern times it has been the usage of judges, not to go out of the way to decide every point that arises, but to adjudicate only upon the point necessary for the disposal of the cause. Had the old practice continued, it is probable that this point would never have arisen in this Court, as I do not believe there was, when this case was before the Court of Error, any difference of opinion with respect to the judgment of the Court of Common Pleas, on the point upon which they had decided the case; but there was ground to support the decision on a point of pleading, and upon that we gave our opinion. (See 1 Scott N. R. 675; 1 M. & G. 738.) We must have affirmed the judgment, whatever we might have thought of the points raised in argument to-day, and nothing was said by the Court of Error negating the opinion we are about to express.

"I am of the same opinion that I was then, that the doctrine

to do this would be to waste strength. It must not be inferred, however, that in any one case the court never has to decide more than one point. Sometimes the decision necessarily depends upon many points, as will be explained hereafter.¹

What is insisted upon just now is merely that the court, in case its decision can be based upon one point, is not compelled to pass upon other points, and that, consequently, if the court declines to pass upon unnecessary points, the court is not departing from the general principle requiring a court to deal with the very case actually before it. It is true that courts often do pass upon unnecessary points,² sometimes believing them to be really necessary, sometimes believing that a decision based upon a novel or doubtful point may be more likely to be correct if supported by still another point, and sometimes believing that by an opinion covering an unnecessary point expense and delay will be prevented in the very litigation, or in other like litigation; but, although the courts now and then depart thus from the

stated by the Court of Common Pleas . . . cannot be supported either on principle or authority." *Per* Lord Abinger, C. B., in *Beckham v. Drake*, 9 M. & W. 79, 90-91 (1841).

"It is a familiar principle that courts are not officiously to raise constitutional questions not urged by counsel. In fact, it is the duty of courts of last resort not to decide an act unconstitutional so long as there are other grounds on which the case may be disposed of." *The State v. Pugh*, 43 Ohio St. 98, 122 (1885), *per* Owen, J.

The indignation of anti-slavery men at the opinion of the majority of the court in *Scott v. Sandford*, 19 How. (U. S.) 393 (1857), commonly known as the Dred Scott Case, was intensified by the fact that, as the court found a fatal absence of jurisdiction in the court below, anti-slavery men conceived that an opinion as to the rights of slave-owners in the Territories was unnecessary, merely *obiter*. 1 Morse's Lincoln (American Statesmen Series), 103-104.

¹ See §§ 22-26.

² For a discussion of the weight of opinions as to unnecessary points, see §§ 13-16, 55-56, 59, 91-92.

rule requiring them to decide only points upon which the actual case depends, courts never depart from the principle forbidding them to decide a wholly fictitious case.¹

¹ Thus the question, whether a State statute is in conflict with the Constitution of the United States, gives rise to a decision of a Federal court, only when the point arises in actual litigation. "This method has the merit of not hurrying a question on, but leaving it to arise of itself. Full legal argument on both sides is secured by the private interests which the parties have in setting forth their contentions; and the decision when pronounced, since it appears to be, as in fact it is, primarily a decision upon private rights, obtains that respect and moral support which a private plaintiff or defendant, establishing his legal right, is entitled to from law-abiding citizens. A State might be provoked to resistance if it saw, as soon as it had passed a statute, the Federal government inviting the Supreme Court to declare that statute invalid. But when the Federal authority stands silent, and a year after, in an ordinary action between Smith and Jones, the court decides in favor of Jones, who argued that the statute on which the plaintiff relied was invalid because it transgressed some provision of the Constitution, everybody feels that Jones was justified in so arguing, and that since judgment was given in his favor he must be allowed to retain the money which the court has found to be his, and the statute which violated his private right must fall to the ground." Bryce's *American Commonwealth*, part I., chapter xxiii.

"Looking upon itself as a pure organ of the law, commissioned to do justice between man and man, but to do nothing more, the Supreme Court has steadily refused to decide abstract questions, or to give opinions in advance by way of advice to the executive. When, in 1793, President Washington requested its opinion on the construction of the treaty of 1778 with France, the judges declined to comply.

"This restriction of the court's duty to the determination of concrete cases arising in suits has excited so much admiration from De Tocqueville and other writers, that the corresponding disadvantages must be stated. They are these:—

"To settle at once and for ever a disputed point of constitutional law would often be a gain both to private citizens and to the organs of the government. Under the present system there is no certainty when, if ever, such a point will be settled. Nobody may care to

Thus, if one wishes to know what will be the legal effect of a certain contemplated form of conveyance, one cannot make an hypothetical case, and procure the decision of a court.

There is in a few States a constitutional provision to the effect that the governor or the legislature may procure from the court of last resort an opinion as to important questions of law, and, particularly, as to the constitutionality or construction of a contemplated statute ; but this is a procedure wholly foreign to the general theory of judicial duty.¹

incur the trouble and expense of taking it before the court. A suit which raises it may be compromised or dropped.

"When such a question, after perhaps the lapse of years, comes before the Supreme Court and is determined, the determination may be different from what the legal profession has expected, may alter that which has been believed to be the law, may shake or overthrow private interests based upon views now declared to be erroneous. These are, no doubt, drawbacks incident to every system in which the decisions of courts play a great part. There are many points in the law of England which are uncertain even now, because they have never come before a court of high authority, or, having been decided in different ways by co-ordinate courts, have not been carried to the final court of appeal. But in England, if the inconvenience is great, it can be removed by an Act of Parliament, and it can hardly be so great as it may be in America, where, since the doubtful points may be the true construction of the fundamental law of the Union, the President and Congress may be left in uncertainty as to how they shall shape their course. With the best wish in the world to act conformably to the Constitution, these authorities have no means of ascertaining before they act what, in the view of its authorized interpreters, the true meaning of the Constitution is. Moved by this consideration, five States of the Union have by their Constitutions empowered the governor or legislature to require the written opinions of the judges of the highest State court on points submitted to them. But the President of the United States can only consult his attorney-general, and the Houses of Congress have no legal adviser, though to be sure they are apt to receive a profusion of advice from their own legal members." Bryce's *American Commonwealth*, part I. chapter xxiv.

¹ See the preceding note and § 62.

The judges, in short, are appointed to dispose of actual litigation, and not to decide moot cases.¹ Hence the proposition of law involved in a decision must be, in effect, that

"As we have no means, in such case, of summoning the parties adversely interested before us, or if inquiring, in a judicial course of proceeding, into the facts upon which the controverted right depends, nor of hearing counsel to set forth and vindicate their respective views of the law, such an opinion without notice to the parties would be contrary to the plain dictates of justice, if such an opinion could be considered as having the force of a judgment, binding on the rights of parties. . . . An opinion upon an abstract question, without any investigation of facts, and without argument, must be taken as an opinion upon the precise question proposed, which cannot affect the rights of parties, should they hereafter be brought before the court in a regular course of judicial proceeding." Opinion of the Justices, 5 Met. (Mass.) 596, 597-598 (1844).

"In giving such opinions, the Justices do not act as a court, but as the constitutional advisers of the other departments of the government, and it has never been considered essential that the questions proposed should be such as might come before them in their judicial capacity." Opinion of the Justices, 126 Mass. 557, 566 (1878). At pp. 561-567 the opinion gives an historical view of the subject.

"Although such an opinion has not the force of an adjudication, yet it is, in a sense, a pre-judgment of the question proposed, and would usually be followed by the subordinate judicial officers of the Commonwealth; and any inhabitant interested in the question might well feel that his rights had been impaired by it without giving him an opportunity to be heard." Answer of the Justices, 148 Mass. 623, 625 (1889).

"While it is our duty to render opinions in all those cases in which either branch of the Legislature or the Governor and Council may properly require them, it is not the less our duty, in view of the careful separation of the executive, legislative, and judicial departments of the government, to abstain from doing so in any case which does not fall within the constitutional clause relating thereto." Answer of the Justices, 150 Mass. 598, 601 (1890).

See also *In re* District Attorneys, 12 Colo. 466 (1889); *In re* Priority of Legislative Appropriations, 34 Pac. Rep. 277 (Colo. 1893); and H. A. Dubuque, "The Duty of Judges as Constitutional Advisers," 24 Am. L. Rev. 369 (1890).

¹ The State v. Baughman, 38 Ohio St. 455 (1882), s. c. *infra*.

the very problem presented by the actual, and usually complicated, case is solved in a certain way.

§ 6. Difficulty that two Cases are never identical.

The strict theory is that the court must consider the whole ~~case~~ properly before it, and no other. It seems to follow that the ~~decision~~ establishes no rule save that in an exactly identical case the ~~rights~~ of the parties will be precisely what the rights are decided ~~to be~~ in the reported case. If this conclusion be correct, it seems ~~to follow~~ that in practice no decision has value as a precedent. ~~No~~ two cases are precisely alike. However similar they may be, ~~there~~ is at least a difference as to the persons interested or as to the ~~times~~ of the events upon which the cases are based.

As to this difficulty the obvious suggestion is that the differences may be immaterial. Is not a suit between B and C to be decided precisely as a suit between X and Y? Yes; unless it happens that in one of the cases, though not in the other, a party is an infant, a lunatic, an alien, or otherwise clothed with extraordinary qualities. And is it not immaterial that one of the suits was begun at one time and the other at another? Yes; unless the Statute of Limitations or a doctrine as to *laches* or some similar principle steps in to make lapse of time important.¹

If it be clear that in the two cases imagined, the reported case and the new case not yet decided, the differences as to parties and as to times are unessential and that in all other respects the cases are identical, then, unless some mistake is discovered, it is clear that the new case ought to be decided just as the old case was decided. In other words, every case ought to furnish a precedent for all other cases in which the circumstances, save as to unessential matters, are identical.²

¹ See § 71.

² See §§ 7, 36, 53, 73.

2. *The necessity of uniformity.*

§ 7. **Second Principle: the Court's Duty to follow a general Rule.**

As the principle confining the authority of the court to the precise case appears to lead to the result that a decision cannot be a precedent for any but an identical case, and as the use notoriously made of volumes of reports shows the result to be actually otherwise, there must be some other principle to which the actual result is partly due. As has no doubt been perceived by the reader, this other principle, the second key to the discovery of propositions of law, is the principle that the court must pass upon each case precisely as it would pass upon a similar case, that is to say, in accordance with a general rule. In other words, in addition to the principle of restriction of jurisdiction there is a principle of uniformity, and hence, although the court can pass upon no case except the one before it, the decision is a precedent for all cases in which the circumstances do not differ materially from the circumstances upon which the decision was based.¹

§ 8. **The consequent Necessity for eliminating unessential Circumstances.**

The proposition of law, then, for which a case is authority is a proposition which strips away the unessential circumstances and declares a rule as to the essential ones.

For example, if the court decides that an oral promise made by a certain person to furnish hay for another person's horse throughout a month cannot be enforced if in return for the promise the promisee simply paid ten dollars already due from him to the promisor, the proposition of law does not name the parties nor the hay nor the horse nor the ten dollars, but simply says that a parol promise cannot be enforced without consideration, and that a consideration is

¹ See §§ 6, 53, 73-79, 86-87.

not found in the performance of a contractual duty which the promisee already owes to the promisor.

§ 9. At least four Propositions involved in every Case.

Accordingly, the reported case may be conceived as containing the following propositions:¹ (1) When the circumstances surrounding parties are thus and thus, the rights of the parties are thus and thus; (2) In this particular case such circumstances do surround the parties; (3) In this particular case the other circumstances are not material; and (4) In this particular case the rights of the parties are as indicated in the first proposition.²

§ 10. Difficult to discriminate between essential and un-essential Circumstances.

Clearly it is important and difficult to determine what is a material difference in circumstances. Here is a place where the beginner cannot expect to rival the experienced lawyer.³

For example, if a court decides that, in a jurisdiction

¹ In the phraseology of logicians, the first of these propositions is the major premise, the second and the third taken together are the minor premise, and the fourth is the conclusion. See § 22, notes, § 73, note.

² "The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of *the law*. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus: Against him who hath rode over my corn, I may recover damages by law: but A hath rode over my corn; therefore I may recover damages against A. If the major proposition be denied, this is a demurrer in law: if the minor, it is then an issue of fact; but if both be confessed (or determined) to be right, the conclusion or judgment of the court cannot but follow. Which judgment or conclusion depends not, therefore, on the arbitrary caprice of the judge, but on the settled and invariable principles of justice." 3 Bl. Com. 396. And see §§ 87-88.

³ See §§ 70-71.

where seals have their ancient force, an instrument signed and sealed by X in the name of Y and with Y's oral consent and in Y's presence binds Y, the beginner may hastily infer that parol authority to execute a sealed instrument is adequate ; but the general rule of law is really the other way, and the explanation of the decision lies in the fact that X acted in the presence of Y and is in the law regarded as a mere automaton moved by the mind of Y.

§ 11. A Test for determining whether a Case is a Precedent for a given Doctrine.

Yet by experiment even the beginner can determine whether it is possible for a given proposition of law to be involved in a given case. In order to make the test, let him first frame carefully the supposed proposition of law. Let him then insert in the proposition a word reversing its meaning. Let him then inquire whether, if the court had conceived this new proposition to be good, and had had it in mind, the decision could have been the same. If the answer be affirmative, then, however excellent the original proposition may be, the case is not a precedent for that proposition,¹ but if the answer be negative the case is a precedent for the original proposition and possibly for other propositions also.

¹ "If the construction put by the court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined, to fix the rights of the parties, and decide to whom the property in contestation belongs. And, therefore, this court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties." *Per* Curtis, J., in *Carroll v. Carroll's Lessee*, 16 How. (U. S.) 275, 286-287 (1853).

§ 12. An indispensable Mark of the Doctrine of a Case.

In short, when a case turns on only one point the proposition or doctrine of the case, the reason of the decision, the *ratio decidendi*, must be a general rule without which the case must have been decided otherwise. As will appear later, the proposition, in order to have full force as authority, must have still other marks.

3. The words of the court.**§ 13. The Opinions of the Judges: Dicta and their Weight.**

The proposition involved in a case is naturally sought in the opinion of the court. The opinion, however, need not contain the proposition and usually does contain a great deal of other matter. The opinion contains, almost invariably, introductory remarks, summaries of earlier decisions, discussions of similar states of fact, and, in short, several kinds of matter intended to elucidate the court's view of the case at bar. So far as the opinion goes beyond a statement of the proposition of law necessarily involved in the case, the words contained in the opinion, whether they be right or wrong, are not authority of the highest order, but are merely words spoken, *dicta*, *obiter*, or *obiter dicta*. Some authorities attempt to distinguish between *dicta* and *obiter dicta*, saying that if the court naturally, though unnecessarily, uses words by way of illustrating or limiting the doctrine necessary to the decision, those unnecessary words are *dicta*, but that if the court goes still farther out of its way, leaves the question that is actually under discussion, and for the sake of illustration or for some other reason discusses subjects wholly foreign to the case, the words thus dropped outside the natural pathway are to be called not simply *dicta* but *obiter dicta*.¹ This attempted distinction between *dicta* and *obiter dicta*, though countenanced by the usage of an eminently respect-

¹ Ram's Legal Judgment (Townshend's ed.) 88-90.

able minority, seems to be unnecessary. At best, it is a distinction of degree and not of kind. For practical purposes the expressions are interchangeable; and, indeed, *dictum*, like *obiter*, is really a mere abbreviation for *obiter dictum*.

No *dictum* is authority of the highest sort. To give it such weight would be to give judges power to decide in advance a case not before them for adjudication, a merely hypothetical case, and to bind by their opinion the court before which that hypothetical case may eventually become a practical problem. This would be a legislative power, and, still worse, a power exercised in the absence of full argument of the hypothetical case. Nevertheless, some weight is very properly given to a *dictum*,¹ a weight similar to that assigned to the sayings of learned text-writers; and in this sense a *dictum* is authority, its weight varying with the learning of the court and with the amount of thought bestowed by the court upon the point covered by the *dictum*.²

§ 14. Weight of Words expressing the strict Doctrine of a Case.

The reason why a *dictum* is not authority of the highest grade is the restrictive principle heretofore pointed out, the principle that the court need not and must not do more than the case at bar demands, and hence cannot pass authorita-

¹ See §§ 35, 55, 59.

The fact that the words of all persons learned in the law have weight is illustrated by what is said by the reporter in Y. B. 40 Ed. III. 49: "Ye shall note the Justices' names, to whose words ye must chiefly give credence, before the sayings of any of the Sargeants."

² *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 399-402 (1821); *State v. Clarke*, 3 Nev. 566, 572-573 (1867); *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 58-60 (1875); *Buchner v. Chicago, Milwaukee & Northwestern Ry.*, 60 Wis. 264, 267-269 (1884).

See Mr. Justice S. F. Miller, in *Dillon's Laws and Jurisprudence*, 263.

And see §§ 55, 59, 68, 91-92.

tively upon any case but that.¹ Does not the same principle make it unnecessary for the court to file an opinion giving the reasons for the decision? Does not the court perform its full duty when it makes up its mind in favor of one party and gives judgment accordingly?² Does it not follow that the opinion of the court, even in so far as it gives the true doctrine of the decision,³ is unnecessary, of no force as a precedent, mere *dictum*?

As to this matter the language of lawyers is not theoretically consistent. The very words actually used by the court are conceded not to have the force of precedent. That force is reserved for the proposition necessarily involved in the decision, whether that proposition be stated by the court broadly, narrowly, wrongly, or not at all. Nevertheless, the words of the court, so far as they state propositions of law necessarily involved in the decision, are not called *dicta*. That expression, as if it were a word of reproach, is reserved for statements that are not the doctrine of the case.

The explanation, not very lucid, of these apparently inconsistent views, appears to be that, in the minds of lawyers, the case, which is composed of the problem submitted to the court and the result eventually reached, is by lawyers treated as personified; that this artificial person utters a

¹ See § 5.

² The judgment or decree is properly the final order, and this is seldom fully reported. See § 108. The opinion is the statement of the reasons for the judgment or decree. Sometimes, especially in English books, judgment is loosely used as the equivalent of opinion. Bishop's First Book of the Law, § 172; Freeman on Judgments, §§ 2, 9; *Houston v. Williams*, 13 Cal. 24 (1859), s. c. *infra*.

³ Decision is not a technical word. It is often used as the equivalent of opinion, but it as properly describes the judgment or decree. *Houston v. Williams*, 13 Cal. 24, 27 (1859), s. c. *infra*. Hence decision is a convenient word to use when one wishes to speak of the result of a case, and not to draw particular attention to either the opinion or the formal entry of judgment.

proposition of law, the very essence of the artificial person's existence; that this proposition of law is the *ratio decidendi* and has the force of precedent; that it is the court's duty to hear this proposition and to embody it in words;¹ that in so far as the words of the court are accurate expressions of the essential proposition they are not *obiter dicta*, for they are spoken in the direct course of duty;² but that, even when the words of the court are perfect expressions of the essential proposition of the personified case, the words derive their

Ides
H. 11. 11. 11.

¹ See § 77.

Perhaps Coke had some such thought when he wrote: "The law is the rule, but it is mute. The king judgeth by his judges, and they are the speaking law, *lex loquens*." Co. Lit. 130 a.

It seems that with the same view Coke devised an etymology for *judicium*. "*Judicium, quasi juris dictum*, the very voice of law and right, and therefore *Judicium semper pro veritate accipitur*." Co. Lit. 39 a. "*Judicium est quasi juris dictum*, so called, because so long as it stands in force *pro veritate accipitur*." Co. Lit. 168 a. This derivation of *judicium* from *juris* and *dictum* is of the same rough sort as etymologies sanctioned by lawyers from the time of Gaius to the time of Coke. "*Unde etiam mutuum appellatum est, quia quod ita tibi a me datum est, ex meo tuum fiat*." Inst. Gai. III. 90. And so Inst. Just. III. xiv. pr. "*Testamentum ex eo appellatur, quod testatio mentis est*." Inst. Just. II. x. pr. And so Loveless, Serjeant, arguing in *Brett v. Rigden*, Plowden, 340, 343 (1568), and Co. Lit. 322 b. "And first as to the definition of the word (agreement) it seems to me that *agreementum* is a word compounded of two words, viz. of *aggregatio* and *mentium*. . . And so by the contraction of the two words, and by the short pronunciation of them they are made one word." Serjeant Pollard's argument in *Reniger v. Fogossa*, Plowden, 1, 17 (1550). Rastell's *Termes de la Ley* (ed. 1609), *sub voc. Testament*, protests against these derivations of testament and agreement.

² "The immediate province of the courts of justice is to administer the law in particular cases. But it is equally a branch of their duty, and one of still greater importance to the community, to expound the law they administer upon such principles of argument and construction as may furnish rules which shall govern in all similar or analogous cases." 1 Douglas, preface, iii.

And see §§ 7, 53, 75-79, 85-93, 98-99, 109.

force as precedents not from the judges individually or collectively, but from the personified case, — not from the fact that they have been pronounced by judges, but from the fact that they must be pronounced by any one who diligently studies the problem and the result.¹ Perhaps this explanation may be aided if one considers what happens when a musician listens to a bird and reduces the bird's song to musical notation for reproduction upon the piano. To the extent to which the notation is accurate, it is not the musician's composition, but is the bird's own song ; and

¹ "Let us inquire what is meant by the term precedent, and what element in a case is to be followed under the rule *stare decisis*. It is not the judgment which the court pronounces upon the rights of the parties involved in the suit. A judgment that A recover of B one thousand dollars is not to be cited as a precedent in a subsequent case to support the right of C to recover the same sum from D, for the judgment is simply a conclusion reached by the application of rules of law to certain facts. We are to look farther in a case than to the judgment to find that which constitutes a precedent. It is found in the rules of law, which are the foundation of a judgment. These rules constitute the formula by which rights of parties are to be determined. When settled by adjudication, courts, under the doctrine *stare decisis*, are required to apply them to subsequent cases. Upon the authority of the decision announcing them they are to be taken as correct. When we look to a case which is called a precedent, we search out these rules for application to the facts in dispute before us ; the judgment therein constitutes a rule in no sense, — it is evidence of the application of rules, legal *formulae*, to facts ; it is the formal recognition of such rules. A case is to be regarded as a precedent when it furnishes rules that may be applied in settling the rights of parties. These rules are to be discovered in the opinions of the judges, and constitute the reasons for the decision. Lord Mansfield says : 'The reason and spirit of cases make law ; not the letter of particular precedents.' *Fisher v. Prince*, 3 Burr. 1364. And Lord Holt declares that 'the reason of a resolution (judgment) is more to be considered than the resolution itself.' *Cage v. Acton*, 12 Mod. 294." *Per Beck, J.*, in *Dubuque v. Illinois Central Railroad Co.*, 39 Iowa, 56, 79-80 (1874).

And on §§ 53, 86-87, 93.

to the extent to which the notation is inaccurate, it is not the bird's song, but is a more or less original and pleasing composition by the musician. According to the analytical jurists, however, there is a difference between the court and the musician, in that the former originally creates the doctrine which it interprets; but this distinction is unimportant in this place, and, besides, it is foreign to the thoughts of most lawyers.¹

§ 15. Inability of the Court to make an unnecessary Proposition the Doctrine of a Case.

From what has just now been said, it appears that the court has not power to determine for what propositions a decision shall be a precedent, and for what propositions a mere *dictum*. The decision is a precedent for the doctrine necessarily involved in it, and not necessarily a precedent for the doctrine stated by the judges. For example, if the judges base their decision upon a certain unnecessary proposition, the decision is not a precedent for that proposition, but is a precedent, though often not a strong one, for the proposition really necessary. This result is not altered by the fact that it is the practice of courts, and in some States their official duty, to file opinions giving the reasons for their decisions. A decision creates a precedent whether there be an opinion or not.²

¹ See §§ 73-79.

² But unless there is an opinion there cannot be a very useful or weighty precedent. See §§ 17, 41-43, 57.

"The records of the court are, indeed, framed in such a manner as to constitute indisputable documents of such parts of the proceedings as are comprised in them, but it is easy to show that this goes but a very little way.

"In the first place, the authority of a decision, for obvious reasons, is held to be next to nothing, if it passes *sub silentio*, without argument at the bar, or by the court; and it is impossible from the record of a judgment to discover whether the case was solemnly decided or not. Records, therefore, even when they contain a suffi-

§ 16. Third Principle: The very Words of the Court not the Doctrine of the Case.

Accordingly, the third key to the discovery of the doctrine of a reported case is the principle, or rather the caution, that the doctrine of the case is not the language of the judges. In so far as the words of the judges go beyond the precise doctrine necessary to the decision, laying down a different rule or a broader rule, they are mere *dicta*.

4. The effect of the court's ignoring possible doctrines.

§ 17. Fourth Principle: Doctrine in the Mind of the Court: Necessity for Deliberation: Familiar Doctrines often not expressed: Extraordinary Circumstances: General Language.

If this reasoning be carried out to its logical conclusion, the result must be that the proposition involved in a case can be written by examining the questions presented in the record, and by then examining the result shown by the judgment, wholly ignoring the opinion upon which the judgment was based. In other words, the proposition would be one and the same, whether there was or was not an opinion.¹ Yet this is not true. Another principle here appears, a fourth key to the discovery of the proposition of a case. This fourth principle is, that a case is not a precedent for any proposition that was neither consciously nor unconsciously in the mind of the court. It is the duty of the court to deliberate. Otherwise decisions could not be con-

cient state of the case, do not afford complete evidence of what is requisite to the future authority of the decision.

"But, in the second place, it is well known in how few instances the material parts of the state of the case can be gathered from the record." 1 Doug., preface, v.

See also "The Reporting System," 7 Law Review, 223, 226-228 (1848).

¹ See § 15, note.

ceived to have any authority whatever, for they would be arbitrary or accidental, and could not be reduced to a scientific system, though, to be sure, persons interested in lotteries and other games of chance do believe that accident can be reduced to a science. What makes decisions of value as precedents is the fact that they are based upon reasoning and not upon chance.¹ If it can be shown that there was no deliberation, it follows that the case is of no authority for any proposition whatever. Further, if it can be shown that, although there was deliberation, a particular point was wholly absent from the consideration of the court, then, even though that point is conceivably an important one, the connection of the decision with that point is not a connection of effect and cause, but is purely accidental, and as to that point the decision is no authority whatever.² This does not mean that a decision is authority

¹ See §§ 42-57.

² "We know, indeed, that it is said that the *reasons* are no part of the *judgment*, and judges are sometimes heard to declare that they consider themselves bound by a decision of one of their predecessors, but that they nevertheless are of opinion that that decision was come to on false grounds. But what can be more unreasonable and illogical than this? It is *possible*, of course, that a conclusion (so called) may be true in fact, although it do not follow from the premises to which it is assigned; but is it *likely*? And at all events has a conclusion thus arrived at any claim to be treated with respect? The odds are against it; its amount of credit, so to speak, is a *negative* quantity; and we must say that we have always considered it a most undignified piece of perverseness to affect to ascribe a sort of infallibility to a judge's decision at the same time that discredit is thrown upon his powers of reasoning. We cannot believe that it is a constitutional doctrine that a decree from the bench has the same magical privileges as the enchanted bullet in *Der Freischütz*, and is sure to hit the right object, although the gun be pointed the other way. Surely the judgment and the reasons for it are too intimately connected to allow of such distinctions; they must stand or fall together; if the latter are good, that is a strong ground for upholding

for nothing that is not mentioned in the opinion. Many obvious points are omitted from opinions; and, if it can be shown that the points must have been in the mind of the court, the decision is authority as to those points, even though the court was hardly conscious of having them in

the former; if they are bad, the other cannot be worth much." "The Reporting System," 7 Law Review, 223, 227-228 (1848).

"A still stronger case, illustrative of the rule that questions not considered in a former case are not authority now, although they appeared in the record, and might have been urged, is *Fouts v. The State*, 8 Ohio St. 98. *Fouts* had been tried for murder in the first degree, convicted, and sentenced to be hung.

"Among the grounds for a reversal of the sentence was the claim that the indictment failed to charge the offence of which he was found guilty. It transpired that other prisoners before him had been convicted and executed under the same form of indictment. Indeed, in a former case, *Moore v. The State*, 2 Ohio St. 500, a conviction under the same form of indictment was sustained and the prisoner executed.

"But, on investigation, the court found the indictment to be fatally bad, in that it did not charge the crime for which *Fouts* was convicted. What did the court do? Did it tell the prisoner that his conviction and sentence were illegal and void, and were under an indictment which did not charge a capital offence, but that he must be executed; that a prisoner had already been ordered to be executed under the same form of indictment, and that the court, from an altar of justice, must be turned to an altar of sacrifice, in order that it should be consistent with itself? On the contrary, the court promptly set aside the sentence of death!

"Bartley, C. J., speaking for the court, said: 'It has been urged that this court had decided this question otherwise, in the case of *Moore v. The State of Ohio*, 2 Ohio St. 500, by approving an indictment of the same kind. In answer to this, it is sufficient to say, that this question was not raised, or brought to the attention of the court in that case. A reported decision, although in a case in which the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a principle not only not passed upon, but not raised or even thought of, at the time of the adjudication.' " *The State v. Pugh*, 43 Ohio St 98, 122-123 (1885), *per Owen, J.*

mind. For example, if there be a decision that a promise is of no force, because based upon a consideration not moving from the promisee, this is an authority for the general proposition that a contract must have a consideration; for, though that general proposition may be assumed not to have been expressed by the court, the familiar general doctrine must be seen to have been in the court's mind. To be sure, it is often difficult to affirm just what the court must have had in its mind with reference to the peculiar circumstances of the case; but that difficulty does not alter the general rule, that whatever was in the court's mind is just as authoritative if unexpressed as it would be if expressed. Thus, if a case presents extraordinary circumstances which could not be forgotten by any one, the decision of the court must be taken to have been affected by those circumstances, even though the opinion says nothing about them. The language used by the court must be read in the light of the facts that were in the mind of the court; for the language was caused by those facts, and was uttered with reference to them. For this reason, as well as for the reason that the court's duty is to pass upon the very case, the rule is that general language is to be interpreted and limited by the facts of the special case.¹

¹ "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Per Marshall, C. J., in *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 399-400 (1821). *Richardson v. Mellish*, 2 Bing. 229, 248 (1824) *accord*.

See also §§ 19, 58.

§ 18. Power of the Court to prevent the Deducing of Doctrines.

Obviously, the opinion of the court is the best guide to what is in the court's mind when it pronounces a decision. Though the language used by the court does not have the force of precedent, it can show what is the doctrine that can properly be derived from the decision, or, rather, it can show what is not to be so derived; for by emphatic words or by necessary implication the opinion can show that a point for which the case might otherwise be cited was absent from the mind of the court and had no part in producing the decision. For example, if a higher court, affirming the action of a lower court, expressly refuses to go into the merits of the case, and proceeds upon the ground that the plaintiff in error did not file his petition in error in season, it is obvious that the decision of the higher court cannot be considered an authority to the effect that the lower court committed no error; and this is true even if it be assumed that the plaintiff in error did actually proceed in due season, and if, consequently, the decision of the higher court cannot be upheld upon any ground except a finding that error was not committed below.¹

§ 19. Consequent Necessity for an Examination of the Opinion.

Thus it appears that, just as the general language used in the opinion must be trimmed down to fit the actual case,² so the general proposition which might be derived from the judgment as distinguished from the opinion must be trimmed down to fit the opinion.

¹ And see §§ 24-26, 56-57.

² "The language of the court in the opinion is to be construed with reference to the question actually under consideration, and should not be extended beyond for any purpose of authority in another and different case." *Wright v. Nagle*, 101 U. S. 791, 796-797 (1879), *per* Waite, C. J. And see §§ 17, 58.

HOW TO FIND THE DOCTRINE OF A CASE. § 21

§ 20. Summary: The Four Keys to the Discovery of the Doctrine of a Case.

This chapter may be summed up as follows : —

- I. The court must decide the very case before it ;
- II. The court must decide the case in accordance with a general doctrine ;
- III. The words used by the court are not necessarily the doctrine of the case ;
- IV. The doctrine of the case must be a doctrine that is in the mind of the court.

§ 21. The Marks essential to the Doctrine of a Case.

Hence the doctrine of a case is a general proposition of law from which, taken in connection with the circumstances of the case, the decision logically follows, and upon which, whether expressed in the opinion or not, the court bases its decision.

CHAPTER III.

CASES INVOLVING SEVERAL QUESTIONS.

§ 22. Cases involving more than one Doctrine: Dependent Propositions.

A decision may be a precedent for more than one proposition. From what has already been said it is obvious that from any case there can be derived a proposition of a narrow form, covering the very case and other precisely identical ones, and a more general proposition that strips away the unessential features of the case and asserts a broad rule.¹ Thus, when it is decided that B is not liable in damages for such and such defamatory words written in such and such circumstances, there is involved in the case not only this narrow proposition, but also the general proposition that such words written in such circumstances are privileged. In this sense, every case involves at least two propositions. Yet this is not what is meant when it is said, as it has been said above, that a case may establish two or more propositions, for the propositions just now introduced by way of illustration are not independent, but are simply two forms of expressing the same truth. Further, it is usually possible to derive from any case still other propositions which are related to the general proposition of the case as, so to speak, its cause or

¹ In other words if a case be treated as in effect a syllogism, either the conclusion or a premise is capable of being considered the proposition necessarily involved in the decision. Yet, as has already been shown, usually the important proposition is the major premise. See §§ 6-12.

its effect.¹ Thus the case just now supposed involves the proposition that within certain limits defamatory communications are not actionable, and the further proposition that some acts *prima facie* tortious are lawful. Yet such propositions, though capable of being framed in words that carry the mind far away from the contemplation of the most obvious proposition of the case,² are not independent of that proposition or of one another. It is often useful to deduce the several related propositions that are involved in a case; but the purpose of this chapter is to treat not of dependent propositions but of independent ones.

§ 23. Independent Propositions: Case involving two or more separate Questions.

Let us suppose that the litigant who was unsuccessful in the lower court takes two or more points of law to a higher court. When the higher court decides the case, does the decision become a precedent as to each of those points?

§ 24. Several Questions brought to the Court: Lower Court sustained.

Let us first suppose that when the case involving two or more points is taken to the higher court that court finds no error. Is the decision of the court above, sustaining the lower court, an authoritative precedent as to each of those points? Yes, for the decision is necessarily based upon the proposition that as to no one of the points was there material error.³

To this answer strict theory appears to require an exception. It is enough for the court to decide that upon the

¹ That is to say, the general proposition may be the conclusion of another syllogism, or a premise of still another.

² Which is usually the major premise next before the conclusion. See § 9.

³ It is assumed that all points taken are in the mind of the court. See §§ 17-18, 57.

whole record taken together no material error appears. The court goes through the points one at a time ; but finally the question is not whether as to some one point there was an error, but simply whether a view of the whole record shows error. It is conceivable that the court should find as to one point an error and should find that by the other points complained of the error was corrected or was rendered immaterial. In this view, a decision affirming the court below contains no proposition as to any one point, but simply contains a wide proposition as to the record as a whole. This, however, is a view of slight practical importance. The possibility of such a case can be safely ignored. Hence, without making any exception, it can be stated that when the court above finds that no error was committed by the court below, the decision of the court above is an authoritative precedent as to each of the points.

§ 25. Several Questions brought to the Court: Lower Court reversed.

Let us suppose, however, that the court above decides that the court below committed material error. A material error as to one of the points taken up is enough to obtain from the higher court a judgment of reversal. It is therefore unnecessary for the court to decide that there was error as to all the points. The necessity lying upon the court does not require it to go farther than to decide that among the points brought before it there is some one as to which there was material error. If a proposition be framed declaring that as to one particular point the court below committed material error, that proposition can be denied and the decision of the court above can be sustained, nevertheless, upon the ground that there was material error as to another point. Does it follow that whenever a case involves two or more points, an opinion accompanying a judgment of reversal cannot, if this one case be taken by itself, have full authority

upon any one point as distinguished from the others? That certainly is the result if the opinion does not explain upon what point the reversal is based. In the instance supposed it is impossible to say that the decision is based upon any one error. To say this would be to say that the other points were properly decided below or were immaterial; and this cannot be said with certainty unless there are other cases turning upon those other points. Hence, while the comparison of many cases may show by a process of elimination what are the propositions of law properly deducible from all the cases as to the several points in the case in question, the decision in that one case, provided it be not supported by an opinion clearly marking out the ground upon which it goes,¹ cannot by itself be an unobjectionable authority. In other words, if points Q and R never occur separately, a thousand decisions to the effect that Q and R taken together are material errors cannot show that Q alone or R alone is an error. If, however, the opinion definitely says that the reversal rests wholly upon one point, the case does become a precedent as to that point. If the court finds error as to two or more points, the case cannot be an authority of the strongest sort upon any one of them, if it is impossible to say that the court considered any particular one of them conclusive. Yet as to each of the errors pointed out by the court the decision certainly does have some authority. As to the points in which the court finds no error, a decision of reversal, being necessarily based wholly upon some other point or points, cannot have full weight.

§ 26. Summary.

The discussion of the theoretical value of cases that involve two or more points has necessarily been intricate. The whole matter can, however, be summed up briefly. When only one point is taken to an appellate court, the case, in

¹ See §§ 18, 43, 56, 57.

whatever way decided, becomes a precedent upon that point. When, however, the appellate court is asked to pass upon two or more points, a distinction must be taken. If the court decides that there was no error, the decision is a precedent as to each of the points ;¹ but if the court decides that there was error, the value of the case as an authority is weakened unless the court clearly bases its decision upon only one point.²

A further and obvious application of the line of argument developed in this chapter shows that, whether the result of a case be a reversal or an affirmance, the value of the case is diminished if the decision of the appellate court is capable of being supported entirely upon any one of several independent points, and if the precise point relied upon is not announced.³ If, however, a decision rests upon several points dependent upon one another, so that no one of them taken by itself will do, the case is an authority as to each of those points.

More briefly, one case is like a weight that is suspended by several iron rods, each of them capable of doing the whole work by itself; and another case is like a weight that is suspended by a chain composed of several links, *one of which is shown to be broken.*

¹ Formula for strong case on two points : Point 1 ruled below for X ; point 2 ruled below for X ; successful party below, X ; case taken to court above by Y on points 1 and 2 ; held, no error.

² Formula for weak case on two points : Point 1 ruled below for X ; point 2 ruled below for X ; successful party below, X ; case taken to court above by unsuccessful party, Y, on points 1 and 2 ; held, error, the court assigning no reason or finding error as to both points.

³ If any adjudication that might be based upon one point is obviously based not upon this point but upon another, the adjudication must be conceded to be an authority of full weight as to the point upon which it is rested, unless, indeed, there is room to argue that the point not specially made was in fact to some extent the basis of the decision. *Clark v. Thomas*, 4 Heisk. (Tenn.) 419 (1871). See §§ 17-19.

CHAPTER IV.

HOW TO WRITE A HEAD-NOTE.

§ 27. The Authorship and Weight of Head-Notes.

It is customary to prefix to each case a head-note, sometimes called a syllabus, showing the points decided. This head-note is usually the work of the reporter, but sometimes it is the work of the judges. By whomsoever made, a head-note is not final authority.¹ Like the words of the opinion, the head-note is merely a guide, more or less trustworthy, to the doctrine of the case. Of course, the value of head-notes depends upon the accuracy of the writer of them and also upon the method pursued by him.²

¹ If a syllabus made by the court goes beyond the points actually involved in the case, it is to that extent a *dictum* only, and does not establish a precedent; for otherwise the court would have the power to adjudicate cases not before it, hypothetical cases. See §§ 5, 13-15, 62. A judicial head-note, however, may show that certain possible doctrines were not in the mind of the court, or were not approved by all the judges. See §§ 17-18, 25-26, 48. "It is an unwritten rule of this court that members thereof are bound only by the points as stated in the syllabus of each case. Necessarily each judge, in writing an opinion, must be permitted to state his reasons for the decision in his own way, and the failure to dissent therefrom in any matter, not stated in the syllabus, is not to be taken as assent to the same." *Per* Maxwell, C. J., in *Holliday v. Brown*, 34 Neb. 232, 234 (1892). It follows that in Nebraska the judicial head-note is really the equivalent of a *per curiam* opinion, and that the opinion actually delivered in the court's name by one of the judges differs but slightly from an individual opinion. See §§ 45, 48.

² "The head-note frequently is misleading if you read it alone and do not take the trouble to read the case." *Per* Lord Fitz-Gerald, in *Cooke v. Eshelby*, 12 App. Cas. 271, 282 (1887).

Though the word head-note primarily means a syllabus printed with the case, it has a secondary meaning whereby it includes syllabi made by any person and for any purpose. In the remainder of this chapter, the word head-note is used in this wide secondary sense.

§ 28. Head-Notes stating several Doctrines.

If a case involves more than one doctrine, all the independent doctrines¹ should appear in the head-note, and all the dependent doctrines² may appear there; but it is often unnecessary to state obvious and familiar doctrines that are merely preliminary steps in the reasoning.³

§ 29. Head-Notes of the long Form: Dicta: Catch-Words.

Sometimes head-notes are very long, giving a full statement of the case and perhaps giving also selections from the opinion. In head-notes framed upon this large plan, even *dicta* are sometimes found, but a competent reporter takes care to prevent *dicta* from being mistaken for the doctrine of the case.⁴ The long form of head-note, though useful in some complicated states of fact, for example, where the question is the existence of fraud, does not satisfy those lawyers who wish to ascertain at a glance whether a case is in point. Hence to such head-notes the reporter often prefixes catch-words in distinct type.

§ 30. Head-Notes of intermediate Form.

Another form of head-note states as briefly as possible the question and the result, stripping off unnecessary facts so carefully that the proposition of law clearly appears, but still giving as much of detail as is necessary to show how the

¹ See § 23.

² See § 22.

³ See § 17.

⁴ Many reporters prefix to the doctrine of the case the word *held*, and to a *dictum* the word *semble*.

proposition of law was applied. This intermediate form of head-note is probably the one most generally approved. Such a head-note seldom mentions *dicta*.

§ 31. Head-Notes of the short Form : Objection to them.

Some head-notes simply state in a very general form the proposition of law and do not show the manner in which the proposition was applied. This form of head-note is not popular. A lawyer is seldom in doubt as to general propositions, such propositions being well settled and being easily found in text-books. The lawyer's problem is to ascertain how a general proposition is to be applied to a particular state of facts. What he needs is a case in which the proposition is applied to circumstances more or less closely analogous to the circumstances surrounding the litigation in which he is employed. He has no time to read every one of the cases in which the general proposition is laid down, and he expects the head-notes to help him in making a selection.

§ 32. Other Forms : Different Forms for Different Cases.

Between the longest and shortest forms of head-notes there are innumerable gradations. Some reporters, for example, slightly change the full form by substituting letters of the alphabet for the names of the parties, but otherwise give a complete statement of the case. Such a head-note at first glance seems to approximate the intermediate form, since it has a superficial appearance of making a generalization.¹ Now and then a reporter prefixes to a case a head-note which combines all the forms here described. Undoubtedly one case is best adapted to one form of head-note and another to another.² For complicated cases, or

¹ Mr. Justice S. F. Miller, "The Use and Value of Authorities," 23 Am. L. Rev. 165, 174 (1889).

² "I have . . . inserted, on the margin, an abstract of the principal point or points of every case. The plan on which I have formed those abstracts has been to state the point as a general rule or

where facts and law are closely entangled, the long form, as already pointed out, has advantages; but for such cases

position. This method, upon the whole, seems to be the most useful, though it has its inconveniences. Where a case turns upon a complication of facts, not likely ever again to be combined together, a proposition including all those facts, and purporting to be a general rule of law, has an uncouth and awkward appearance." 1 Douglas, preface, xiii.

"It cannot be too strongly urged that if a case affords an illustration of a well-known principle, the profession does not gain by that principle being smothered in a mass of facts. A principle stated in six lines of a head-note is one thing, a conglomeration of facts with copious extracts from documents, and possibly fifteen or twenty letters of the alphabet representing persons or places, is another. The chief reasons for the excessive length of modern head-notes appear to be these: a mass of facts and other superfluous matter is necessary in order to avoid the head-note being in similar terms to a side-note in an older report that has been cited to and approved by the court, or the statement of any clear legal principle is impossible owing to the special character of the decision, or the reporter is unable or unwilling to give the time and trouble necessary to sift out the legal grain from the surrounding chaff of facts. Again, head-notes often contain several sections of Acts of Parliament set out at length. This practice is nearly always reprehensible, though the gist of the sections might be usefully mentioned. . . . A *semble* is clearly a proper subject of a head-note, but a query is in almost every instance useless, for in such cases the court offers no opinion; if an opinion is offered that *dictum* would be a *semble*. . . . One of the best tests whether a case is reportable or unreportable is the length of the head-note: if no head-note can be made to enunciate a legal principle without setting out half a page of facts, the case is useless to the profession; if a head-note consists of a half page or more of facts, and at the end of those facts one reads, 'Held, that the plaintiff could not recover,' or 'was not entitled to the relief claimed,' we may be sure that our publisher has presented us with an illustration of a well-known doctrine without giving us an opportunity of reading that doctrine in a crystallized form." John Mews, "The Present System of Law Reporting," 9 Law Q. Rev. 179, 182-183 (1893).

In apparent conflict with part of the views just now quoted is the following editorial note from 9 Law Q. Rev. 201-202 (1893):—

"'Head-notes as she is wrote' are again exemplified in Maxim

some reporters write the short form, simply stating the general proposition, and then add that the facts are complicated and peculiar.

§ 33. Examples.

The difference between the forms of head-note may be illustrated by composing several head-notes for one case. For *Fougue v. Burgess*,¹ a very full head-note might be as follows: "In an action for the wrongful seizure by Burgess, the defendant, of a sewing-machine belonging to Mrs. Fougue, the plaintiff, it appeared that the sewing-machine was seized by a constable acting under an execution in favor of Burgess and against one McLain. In order to show that McLain, and not Mrs. Fougue, owned the sewing-machine, the defendant at the trial introduced as

Nordenfelt & Co. v. Nordenfelt, [1893] 1 Ch. 630, C. A., a most important case on covenants in restraint of trade. The facts and the decision of the C. A. that the covenant 'was under the circumstances reasonable' are set out, and no attempt is made to extract any principle from the judgments. The otiose addition 'Covenants in general and partial restraint of trade discussed' is all that we get. Surely it would not have been very hard for the reporter, having heard the case, and with the assistance of Bowen, L. J's., elaborate judgment, to help the reader a little more. Let us try what we can do with only the means of an ordinary reader:—

"The old rule against agreements in general restraint of trade is still part of the law, but its application may be modified according to the development of trade in modern times.

"A restrictive agreement is not bad for generality if it is reasonably limited as to place, or as to persons dealt with, or as to the manner of carrying on the trade. Limitation in time is not alone a sufficient, as on the other hand it is not a necessary condition of validity.

"The rule against generality does not apply to the sale of a goodwill or a trade secret, provided that the restriction is not unreasonable as between the parties, or injurious to the public.

"The Court has regard to the conditions and effective area of the business in question in deciding what limits are reasonable."

¹ 71 Mo. 389 (1880).

a witness one Taylor, who, in spite of an objection by the plaintiff, was permitted to testify that, in the absence of Mrs. Fougue, McLain professed to the witness to be the owner of the sewing-machine. The supreme court held that under the hearsay rule this testimony was inadmissible." This head-note might be made to assume the appearance of a generalized statement by writing "B" for Burgess, "F" for Mrs. Fougue, and so on. By successive condensations or generalizations the head-note can be made to assume the other forms described above. An intermediate form might be: "The question being whether a certain sewing-machine belonged to F or to M, the hearsay rule prevents T from testifying that, in the absence of F, M claimed ownership." A second intermediate form might be: "When the question is whether property belonged to one person or to another, the hearsay rule excludes testimony that in the absence of one the other claimed ownership." A short form might be: "Testimony that some one once affirmed the existence or non-existence of a state of facts is inadmissible because of the hearsay rule." Another short form, perhaps the shortest possible, might be: "Hearsay is inadmissible." Of all these forms the two intermediate ones appear to be the most useful. The first short form is in such general words as to be obscure. The second short form is of no use whatever. It will be noticed that if the forms be connected with one another by the word "for," each serves as the reason for its predecessor, and that the forms may with advantage be given in inverse order and connected with one another by the word "hence." It will be noticed, also, that only the shortest of these head-notes expresses formally a general proposition of law. A separate statement of the proposition of law is seldom necessary, for in most cases the proposition of law sufficiently appears, and most usefully appears, in a brief statement of the question and the result.

§ 34. The Value of Skill in preparing Head-notes.

It is obvious that to the reporter skill in preparing head-notes is invaluable and almost indispensable.¹ To the compiler of digests also such skill is important, for digests are substantially collections of head-notes arranged alphabetically according to subjects.² The paragraphs of a digest are often *verbatim* repetitions of the head-notes found in the reports; but of course the skilled digester prefers to read the cases for himself and to make his own head-notes. Some digests are composed of paragraphs similar to the long head-notes described above, and are almost entitled to be called abstracts or abridgments of the reports.³ Most of the digests published in the United States are composed of paragraphs similar to head-notes of the intermediate form. Collections of head-notes of the short form are usually called index-digests.

Reporters and digesters are not the only persons to whom the ability to frame accurate and pithy head-notes is useful. Authors of text-books must make head-notes as the basis for comment or for citation. Judges must make them as the basis for opinions. Counsel must make them as the basis for briefs or for oral arguments.⁴

¹ See § 102.

² See §§ 110-117.

³ Chitty's Equity Index is an example.

⁴ See § 129.

CHAPTER V.

HOW TO CRITICISE CASES.

§ 35. Importance of Criticism.

The preceding chapters have attempted to show how the doctrine of a reported case is ascertained ; and incidentally they have called attention to several points pertaining to the weight of reported cases. It now becomes necessary to gather together those points and others of a similar nature. Partly on account of carelessness and partly on account of the difficulty of finding strong cases directly in point, the writers of briefs and of text-books frequently cite cases that are open to criticism. Clearly, it is necessary to learn what objections may be urged. By skilful criticism decisions apparently conflicting may be reconciled and hostile decisions may often be swept away.¹ The chief weapon of a lawyer of the highest grade is criticism of cases.

§ 36. Many Grounds : Objections not of same Weight.

Criticism may be based upon the nature of the report, upon the arguments of counsel, upon the opinion of the court, upon the nature of the question, upon the standing of the court, and upon the subsequent state of the law. It must not be thought that all the objections that can be made are of the same weight. Some of them are hardly

¹ For example, see *Bole v. Horton*, Vaughan, 360 (1673) ; *Burke v. Jones*, 2 Ves. & B. 275 (1813) ; *Taylor's Admr. v. Spindle*, 2 Gratt. (Va.) 44 (1845) ; *Hilliard v. Richardson*, 3 Gray (Mass.), 349 (1855), s. c. *infra* ; *Leavitt v. Blatchford*, 17 N. Y. 521 (1858) ; *Insurance Co. v. Mosley*, 8 Wall. (U. S.) 397, 409-420 (1869), *per* Clifford, J., dissenting ; *Reg. v. Ramsay*, 48 L. T. R., N. s. 733, 737-738 (1883), *per* Lord Coleridge, C. J., charging the jury.

entitled to any weight at all. The objections most frequently made will now be summarized, together with brief reasons for most of them.

1. *The nature of the report.*

§ 37. **Unreported Cases.**

Now and then unreported cases are cited.¹ The absence of a report may make it difficult to prove what the decision was, and may indicate that the court did not consider the case an important one. The former objection is reduced to a minimum if a certified copy of the opinion is procured, and the latter objection disappears wholly if the case is one that in due course will be reported.

§ 38. **Newspaper Reports.**

If the report is found in a newspaper, it is of slight value, for newspaper reports are presumably not the work of law-

¹ Obviously, the use of an unreported case may greatly surprise counsel.

"But supposing that a person should be so fortunate as to be able to extract something comprehensible out of *printed* contradiction, yet other contradictions may make their appearance in *manuscript*; and, overthrowing all his hard-earned knowledge, remind him once again of *the glorious uncertainty of the law*. Is the law of England to depend upon the private note of an individual, and to which an individual can only have access? Is a Judge to say — 'Lo! I have the law of England, on this point, in my pocket. Here is a note of the case, which contains an exact statement of the whole facts, and the decision of my Lord A. or my Lord B. upon them. He was a great, a very great man. I am bound by his decision. All you have been reading was erroneous. The printed books are inaccurate. I cannot go into principle. The point is settled by this case.' Under such circumstances, who is to know when he is right or when he is wrong? If conclusions from unquestionable principles are to be overthrown in the last stage of a suit by private memoranda, who can hope to become acquainted with the laws of England?" Watkins' *Conveyancing* (ed. 1838), introduction, lxiii. See also "The Reporting System," 7 *Law Review*, 223, 236-237 (1848).

yers, certainly not of experienced lawyers, and hence are very likely to be inaccurate.¹ Newspaper reporters and editors, and indeed all persons not trained as lawyers, easily fail to perceive the distinctions upon which cases turn, and thus are betrayed into too broad generalizations. Thus a case turning on the point that certain State laws taxed national banks more heavily than they taxed State banks, and that consequently the State tax was invalid by reason of certain Federal statutes, was reported by a financial newspaper as a decision that the States cannot tax national banks. Again, a case turning on the point that unless a livery-stable keeper knows his horse to be faulty, or expressly warrants

¹ Ancient chronicles, kept or compiled by monks or by other persons not learned in the law, are open to similar criticism ; and so are most histories.

"And for that it is hard for a man to report any part or branch of any art or science justly and truly, which he profeseth not, and impossible to make a just and true relation of any thing that he understands not ; I pray thee beware of chronical law reported in our Annals, for that will undoubtedly lead thee to error." 3 Co., preface, viii.

"No Judge could properly refuse to hear a case quoted by the Bar, but a Judge would not upon a law point allow a newspaper report to be quoted." Lord St. Leonards, in *Daniel's History of the Law Reports*, 101.

"In the important proceedings relating to the *Alexandra* . . in the Court of Exchequer, the only judicial decision referred to on the construction of the Foreign Enlistment Act was one by the late Mr. Justice Coltman, fourteen years ago, —and of this no other than a newspaper report could be found. The Court, after vain efforts to obtain a note of the decision made by any Judge, barrister, or shorthand writer, was compelled to resort to a subterfuge to avoid infringing the rule against receiving newspaper reports as authorities, by asking Mr. Baron Martin, who had been engaged as counsel in the case, to refer to *The Times* of July 6, 1849, and, after thus refreshing his memory, to say whether the decision there reported was pronounced." Serjeant Pulling, in *Daniel's History of the Law Reports*, 87, n. (2).

the horse to be gentle, one who hires the horse takes the risk of the horse's proving to be wild or vicious, was reported by a general newspaper as a decision that one who hires a horse always takes all risks. In each of these cases it is obvious that the result reached by the court would have flowed from the wide propositions laid down in the newspapers and that the error lay in failing to take distinctions.

The objection urged against newspapers does not apply to law periodicals.¹ It is a fact, too, that a few newspapers not exclusively devoted to law give law reports of great accuracy, but the reputation of such newspapers is merely local, and the general rule is that no reliance is to be placed on a newspaper report.

§ 39. Reports of low Standing.

Some of the older reports, though perhaps the work of accurate lawyers, were not originally intended for publication, but were eventually published posthumously, often without the reporter's name and still more often without revision. Such volumes, being composed of rough notes rather than of painstaking reports, have a poor reputation for accuracy,² and accordingly all cases contained in them are viewed with suspicion.³

§ 40. Inharmonious Reports.

Now and then a case is found in several reports. If the reports differ, the authority of the case is obviously affected.⁴

¹ But see § 65.

² Wallace's Reporters (4th ed.), 4-6, 16, 22.

³ Of trusting to mere memory or to reports of uncertain authority, Coke said: "Therefore as I allow not of those that make memory their storehouse, for at their greatest need they shall want of their store; so I like not of those that stuff their studies with wandering and masterless Reports, for they shall find them soon to lead them to error." 1 Co., preface, xxvii.

⁴ Thorp v. Thorp, 12 Mod. 455, 464 (1701); Osborne v. Morgan, 130 Mass. 102, 106 (1881).

Old cases are the ones most likely to be found diversely reported in various reports ; for, though some of the old reports are of the highest grade of accuracy, there are others, as has been said, of low repute.

§ 41. Scanty Reports.

If a case is not reported fully, its value is diminished ; for if neither the reporter's statement of the case nor the court's opinion shows fully the problem presented to the court and the final disposition of that problem by the court, with the court's reasons, of course it is not possible to ascertain what is the proposition of law involved in the case.¹ However, a brief report may be complete ; and a verbose one may omit much material matter. The ancient reports are less verbose than the modern. The verbosity of modern reports may be due in part to the prevalence of shorthand writing ; but it seems to be due principally to the introduction of elaborate written opinions² and to the reduced cost of books.

2. *The arguments of counsel.*

§ 42. Thoroughness of Argument.

As it is the office of the court to pronounce a decision after having fully examined the questions presented and the law relating thereto, and as it is the office of counsel to aid the court by presenting the questions and the law with the fulness that comes from long familiarity with the case and from thorough examination of authorities, a case decided after little or no argument has not full weight.³ Nor has a

¹ See §§ 5-21.

² See §§ 105-106.

³ "One should not know of what metal a bell was unless it were well beaten; *quasi diceret*, by good disputing the law shall be well known." *Per* Hankford, J., Y. B. 11 Hen. IV. 37 a (1409), cited in 9 Law Quarterly Review, 127, n. (1).

Dillon's Laws and Jurisprudence, 190.

case that goes off upon a ground not discussed by counsel.¹ In the older reports the arguments are generally given, though in a condensed form. In most of the reports of the present day the arguments of counsel are seldom given. Hence it is not always possible to say that a certain case was or was not decided after a full presentation of the questions involved and of the authorities in point.²

3. *The opinion.*

§ 43. No Reasons: no Citations.

If the reasons for a decision are not given, the decision can be of little weight, for it does not appear to have been the result of thorough investigation. Clearly, the same result follows if there is no citation of authorities.³

§ 44. Brevity.

The brevity of an opinion may indicate that the court did not consider carefully the questions involved, and may even make it impossible to say what points the court intended to decide. Yet there is a difference between scantiness and conciseness.

§ 45. *Per Curiam.*

If the opinion of the court is rendered anonymously, that is to say, *per curiam*, it does not receive as high respect as an opinion vouched for by some one judge and adopted by

Compare *United States v. Hudson*, 7 Cranch, 32 (1812), with *United States v. Coolidge*, 1 Wheat. 415 (1816).

And see § 57.

¹ In criticising *Gillet v. Phillips*, 13 N. Y. 114 (1855), Johnson, C. J., in *Leavitt v. Blatchford*, 17 N. Y. 521, 543 (1858), said: "The applicability of the statute seems to have been assumed without discussion, either in the printed points of the counsel or in the opinion delivered."

² See § 104.

³ Mr. Justice S. F. Miller, "The Use and Value of Authorities," 23 Am. L. Rev. 165, 170 (1889). See also §§ 15, note, and 57.

the court.¹ The reason is that one who writes an anonymous opinion is not likely to work as carefully as does one who writes an opinion to which his name will be forever attached. Yet this criticism is not entitled to great weight if taken by itself; for it must not be forgotten that a *per curiam* opinion is the opinion of the whole court.² The principal reason for rendering the opinion anonymously is the court's belief that a long discussion is unnecessary. Brevity may be a serious objection, as already has been pointed out; but the mere absence of the name of the author of an opinion indorsed by the whole court seems to be a small matter. Nevertheless, the fact remains, as has been said, that a *per curiam* opinion is not treated with the highest respect.

§ 46. Court's Opinion by dissenting Judge.

If the opinion of the court is written by a judge who does not concur in it,³ the absence of personal responsibility gives rise to an objection similar to the objection urged against *per curiam* opinions. However acute and conscientious a dissenting judge may be, he cannot be expected to state fully and sympathetically the views and reasons from which he dissents.

§ 47. Divided Court.

If the court is divided equally, the case has no authority as a precedent.⁴ If the court is divided at all, the force of

¹ Editorial note in 25 Am. L. Rev. 611 (1891).

² In *Clarke v. Western Assurance Co.*, 146 Pa. 561, 570 (1892), Paxson, C. J., commenting on *Royal Ins. Co. v. Roedel*, 78 Pa. 19 (1875), said: "It is true, this is criticised as only a *Per Curiam* opinion, but why it should have less weight for that reason is not clear. A *Per Curiam* is the opinion of the court in a case in which we are all of one mind, and so clear that we do not think it necessary to elaborate it by an extended discussion."

³ Examples are *Howard v. Albany Ins. Co.*, 3 Denio (N. Y.), 301 (1846), and *Miller v. Miller*, 78 Iowa, 177 (1889).

⁴ "It has always been held that a decision of a court, concurred

the case is weakened even in the same jurisdiction. It is often said that the strength of a dissenting opinion weakens the case. This is true, if the reasoning of the dissenting judge is really stronger than the reasoning of the majority of the court; but if the reasoning of the minority is fairly met by the majority, the presence of a strong dissenting opinion shows that the case was considered thoroughly, and accordingly ought to be conceded to strengthen the case as an authority. Whatever view may be taken of this question, it is clearly important that the reporter should indicate the fact that the court was divided. Further, though there is in some quarters opposition to publishing dissenting opinions, it seems to be the right and the duty of dissenting judges to indicate the nature, and also the reasons, of their dissent. The expression of the points as to which they dissent may show that as to other points the case is an authority of high order; and the expression of the reasons may aid courts of other jurisdictions to determine what is the better view of the law.¹

in by less than a majority of the judges, has not the force of a precedent. When there is an equal division of opinion in this court, the decision of the court below stands affirmed." *Per* Beck, J., in *Dubuque v. Illinois Central Railroad Co.*, 39 Iowa, 56, 80 (1874). And see § 48.

When a case is carried to an appellate court and the judges of that court are equally divided, the result is an affirmance from necessity. *Durant v. Essex County*, 7 Wall. (U. S.) 107, 110 (1868). An affirmance from necessity does not serve as a precedent. *Morse v. Gould*, 11 N. Y. 281, 285 (1854). See William Green, "*Stare Decisis*," 14 Am. L. Rev. 609, 629 and n. (1), 630-632 and notes (1880).

Yet it has been said that an affirmance from necessity by the House of Lords makes a precedent of full force. *Beamish v. Beamish*, 9 H. L. C. 274, 338 (1861), *per* Lord Campbell, C.

Upon this point there are pertinent arguments each way.

¹ See §§ 59, 757, 107

§ 48. Judges concurring in Result but not in Reasoning.

Even when all the judges occur in the result, the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially.¹

§ 49. Unconscious Overrulings.

If an opinion overlooks earlier contrary decisions in the same jurisdiction, this is a good ground for criticism. It is clear that such a case was not decided after thorough investigation; and it is not clear that, if a thorough investigation had been made, the court would have been willing to overrule former decisions.

§ 50. Failure to notice contrary Decisions in other Jurisdictions.

If a decision is contrary to the weight of authority in other jurisdictions and is given in apparent ignorance of such

¹ "There must be a concurrence of a majority of the judges upon the principles, rules of law, announced in the case, before they can be considered settled by a decision. If the court is equally divided or less than a majority concur in a rule, no one will claim that it has the force of the authority of the court.

"It is of frequent occurrence in this court that two judges, adopting rules that are not recognized by the others, reach thereby conclusions approved by all. Who would claim that such rules are to be regarded as law announced by this court? Certainly it cannot be claimed, if a decision be reached by the adoption of diverse rules by the different members of the court, that it is to be regarded as authority. We have seen that the rules of law followed in a decision constitute what we call a precedent. If the judges do not agree upon these rules, and less than a majority concur in them, the decision is not authority." *Per* Beck, J., in *Dubuque v. Illinois Central Railroad Co.*, 39 Iowa, 56, 80 (1874). At that time the Supreme Court of Iowa consisted of four judges.

See also § 47.

Cases in which the judges agreed in the result but not, it seems, in reasoning, are *Price v. Easton*, 4 B. & Ad. 433 (1833), and *Vyse v. Wakefield*, 6 M. & W. 442 (1840).

authority, it is open to the charge of being ill-considered. Hence it has little weight outside the jurisdiction in which it is pronounced.

§ 51. Relying upon misunderstood or overruled Cases.

It is a grave objection to a decision that it is based upon authorities that were misunderstood,¹ or that were already overruled, or that have since been overruled. Yet a distinction is to be taken between instances where overruled cases followed as precedents were decided in the same jurisdiction, and instances where they were decided elsewhere. If the law of a jurisdiction has become firmly established by reason of following cases decided in another jurisdiction, the law thus established will not be overthrown by merely showing that the cases followed were eventually in the foreign jurisdiction overruled.² There is a natural and constantly increasing desire, that the doctrines of each jurisdiction shall harmonize with the doctrines of other jurisdictions using the same general system of law ; but this desire cannot be indulged so far as to enable one jurisdiction to dictate to others.³ The lawyer who attacks the doctrine

¹ *Rumsey v. N. Y. & N. E. R. R. Co.*, 133 N. Y. 79, 86-87 (1892).

² Thus, *Howard Ins. Co. v. Scribner*, 5 Hill (N. Y.), 298 (1843), having been followed by *Sloat v. Insurance Co.*, 49 Pa. 14 (1865), and the latter case having been recognized by later Pennsylvania cases, *Paxon, C. J.*, delivering the opinion of the court in *Clarke v. Western Assurance Co.*, 146 Pa. 561, 571 (1892), says :—

“I have endeavored to show that the authority of *Sloat v. Insurance Co.* has not been shaken by any subsequent decision of this court. We are now asked to overrule it, because *Howard Ins. Co. v. Scribner*, cited by Justice Read, has been overruled in New York by *Ogden v. Insurance Co.*, 50 N. Y. 388. With the highest regard for the able and learned judges who decided that case, we are not disposed to follow them in this instance. We can only do so by overturning our own cases, and we have not been convinced that they are erroneous.”

³ See §§ 85-90.

established in his own jurisdiction, and elsewhere discredited, must show that it is unscientific or unjust, or that it was originally established in ignorance of the fact that it was already discredited; and even then he may find that it seems expedient to preserve the doctrine long followed.¹

§ 52. Relying upon unsustained Text-Books.

It is also a grave objection to a decision that it is based upon text-book authority not supported by the cases cited in the text-book. No one but a beginner needs to be told that in using even the best text-books one must carefully examine the citations in order to see whether they are in point and whether they suggest valuable distinctions. It is not the custom of careful courts to rely upon text-books alone.

§ 53. Inartistic Reasoning: Stare Decisis.

If a decision is based upon reasoning that can be shown to be erroneous, that is to say, contrary to the analogies and spirit of the law, it will be disregarded in other jurisdictions and may even be overruled in the same jurisdiction. Yet decisions that can be considered as giving rise to a rule of property law are not likely to be overruled, however much opposed they may be to the later views of the courts in the same jurisdiction; for the theory is that it is important that the law be settled, and especially that it be settled as to property rights. This is the principle of *stare decisis*.² When a decision is disapproved in the same jurisdiction, it is usually not immediately overruled, but is doubted, distinguished, whittled away piecemeal.³

¹ See §§ 53, 93.

² 1 Bl. Com. 69-71; 1 Kent's Com. 475-479; William Green, "Stare Decisis," 14 Am. L. Rev. 609, 629-651 (1880). And see §§ 7, 73-78, 84, 86-87, 93-96.

³ See §§ 66, 93-96.

§ 54. Local Law.

If a decision turns upon a statute not declaratory of the common law, it has no weight in a jurisdiction where there is not a substantially similar statute.¹ The same objection applies to decisions based upon what the court believes to be the peculiar but firmly established doctrine within the jurisdiction.

§ 55. Dictum.

A *dictum*, however emphatic and however well reasoned, is not authority of the highest order.² As already explained,

¹ See §§ 74, 78.

² In *Bole v. Horton*, Vaughan, 360, 382-383 (1673), Vaughan, C. J., in criticising Evans' Case, Moore, 96 (1569-1571), said: "This opinion makes against me, I confess, but give it this answer. 1. This case is not reported by Sir Francis Moore, but reported to him, *non constat* in what manner, nor by whom. 2. It was no judicial opinion, for Plowden, Bromley, solicitor, two serjeants, Manwood and Lovelace, are named for it, as well as Dyer and Catlin, who were then Chief Justices of the several courts, which proves the opinion not only extra-judicial, but not given in any court. 3. The motive of their opinion was, because the warranty was collateral, which is no true reason of the binding, or not, of any warranty. 4. An extra-judicial opinion given in or out of court is no more than the *prolatum* or saying of him who gives it, nor can be taken for his opinion, unless everything spoken at pleasure must pass as the speaker's opinion. 5. An opinion given in court, if not necessary to the judgment given of record, but that it might have been as well given if no such, or a contrary, opinion had been broached, is no judicial opinion, nor more than a *gratis dictum*."

"But an opinion, though erroneous, concluding to the judgment, is a judicial opinion, because delivered under the sanction of the judge's oath, upon deliberation, which assures it is, or was, when delivered, the opinion of the deliverer. Yet if a court give judgment judicially, another court is not bound to give like judgment, unless it think that judgment first given was according to law. For any court may err, else errors in judgment would not be admitted, nor a reversal of them. Therefore, if a judge conceives a judgment given in another court to be erroneous, he, being sworn to judge according

a court has no authority to pass upon questions not involved in the litigation.¹ Further, even if the court had such authority, neither court nor counsel would give careful attention to unnecessary questions. *Dicta*, however, are often respected and followed.²

§ 56. Going off on another Point: Several Points.

If the case really was decided upon some point independent of the point for which it is cited, then, even though it could have gone off upon the latter point and even though the opinion as to the latter point is emphatic, as to that point the case is not a strong authority, but is practically the equivalent of a *dictum*.³ The same criticism may be made,

to law, that is, in his own conscience, ought not to give the like judgment, for that were to wrong every man having a like cause, because another was wronged before, much less to follow extrajudicial opinions, unless he believes those opinions are right." This opinion of Vaughan, C. J., contains many other useful examples of criticisms upon cases and text-books.

¹ See §§ 5, 13-16.

² See §§ 13, 59, 68, 91-92.

³ Similarly, when the Supreme Court of the United States is asked on writ of error to reverse the judgment of a State court by reason of an erroneous determination of a Federal question, the Supreme Court insists that the holding as to the Federal question must be shown to have been essential to the judgment actually rendered. Curtis on Jurisdiction of United States Courts, 40-45, 52-58; *Murdock v. City of Memphis*, 20 Wall. (U. S.) 590 (1874). "It is settled law that, to give this court jurisdiction of a writ of error to a State court, it must appear affirmatively, not only that a Federal question was presented for decision by the State court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. . . . It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the de-

though obviously with much less reasonableness and force, if the case be cited as an authority for the point upon which it actually did go off, provided there was another point upon which the decision might have rested, and provided the court saw that other point. An attempt has already been made to elucidate this matter.¹

§ 57. A Point not argued and not perceived.

If the decision requires for its support a point that has not been argued by counsel and has not been perceived by the court, the case is not a strong authority for that point.² Yet it must be remembered that many essential steps in reasoning may be present to the mind of the court though absent from its opinion.³

§ 58. Other Objections: Precise Point: General Language: Distinguishing Cases.

Many other grounds for criticism may be enumerated.⁴ For example, it may sometimes be found that the court did not decide that there was no error committed by the court below, but simply decided that the error, if any, was not prejudicial; or it may frequently be found that the opinion of the court, being framed with a view to the circumstances actually before it, is expressed in language so broad as to cover cases not in the least analogous.⁵ When the precise

cision of the latter question is sufficient, notwithstanding the Federal question, to support the judgment, this court will not review the judgment." *Eustis v. Bolles*, 150 U. S. 361, 366 (1893), *per Shiras, J.*

¹ See §§ 23-26.

² "*Shaw v. G. W. R. Co.*, [1894] 1 Q. B. 373, is a singular example of a case of some general importance being decided on a ground not taken in the argument at all." Editorial note, 10 Law Q. Rev. 111.

See §§ 15, note, 17, 42. See also Bishop on Contracts, § 50, note 2.

³ See §§ 17, 22, 26.

⁴ See Ram's Legal Judgment, Chapters XV.-XVIII.

⁵ In *Richardson v. Mellish*, 2 Bing. 229, 248 (1824), Best, C. J.,

point upon which one case turns is different from the point upon which another somewhat similar case turns, each case is said to be distinguishable from the other.

59. Weight of a criticised Opinion: Home and other Jurisdictions.

When it is said that an opinion is open to criticism, what is meant is that in other jurisdictions it might not be considered of high authority, and might not be followed unless supported by other authority or by technical reasoning. In the jurisdiction in which the case is decided, many of the criticisms given above cannot be urged effectively, for in that jurisdiction the point actually decided will be treated as law until there is an overruling decision, and in that jurisdiction even *dicta* will be greatly respected by the lower courts.¹

4. *The nature of the question.*

§ 60. Case of first Impression.

If the case is the first of the kind, a case of first impression, the decision is not of great weight until supported by subsequent decisions. In a case of first impression, there is by definition a total lack of precedent; and there can also be only an imperfect foresight of the results to which the new decision may lead.²

in commenting on *Card v. Hope*, 2 B. & C. 661 (1824), said: "There are expressions used by the Chief Justice in that case which seem to bear on the present; but the expressions of every judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion. . . . I am quite satisfied, that not one of the learned judges who decided that case ever conceived that its authority could be pressed to the extent to which it has been pressed in this case."

See also *Woodruff v. Parham*, 8 Wall. (U. S.) 123, 138 (1868), *per* Miller, J.; and *Ex parte Young Ah Gow*, 73 Cal. 438, 448-451 (1887), *per* Thornton, J. And see § 17 and note.

¹ See §§ 13, 14, 55, 91-92.

² See §§ 53, 74.

§ 61. Peculiar Circumstances : Politics.

If the circumstances of the case are very peculiar, for example, creating unusual sympathy in behalf of one of the parties, the weight of the decision is diminished.¹ So is the weight of a decision pronounced in a political case in favor of the political party to which the majority of the court adhere, for it is impossible to determine to what extent such a decision is due to prejudices of which the judges may be unconscious.² Sometimes the weight of a

¹ For an example of the effect which the apprehended hardship of a particular case may cause in the mind of a judge, see the dissenting opinion of Duvall, J., in *Mima Queen v. Hepburn*, 7 Cranch (U. S.), 290, 298-299 (1813).

² In Henry Adams's *History of the United States*, Vol. III., (Jefferson's Second Administration, Vol. I.,) Chapter XIX., it is suggested that Chief Justice Marshall's rulings during the trial of Aaron Burr may have been affected by personal and political bias.

Similarly, a popular explanation of Chief Justice Marshall's course in *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518 (1819), is that it was influenced by his political prejudices. Lodge's *Webster* (American Statesmen Series), 87-89.

The criticisms sometimes made as to the political bias of judges of the Supreme Court of the United States are enumerated in Bryce's *American Commonwealth*, part I., chapters xxiii.-xxiv. The following passage is from the latter chapter. "Two of its later acts are thought by some to have affected public confidence. One of them was the reversal, first in 1871, and again, upon broader but not inconsistent grounds, in 1884, of the decision given in 1870, which declared invalid the Act of Congress making government paper a legal tender for debts. The original decision of 1870 was rendered by a majority of five to three. The court was afterwards changed by the creation of an additional judgeship, and by the appointment of a new member to fill a vacancy which occurred after the settlement, though before the delivery, of the first decision. Then the question was brought up again in a new case between different parties, and decided in the opposite sense (*i. e.* in favor of the power of Congress to pass legal tender Acts) by a majority of five to four. . . The other misfortune was the interposition of the court in the presidential electoral count dispute of 1877. . . . The five justices

decision is affected by the fact that the controlling judge had a natural or acquired inclination toward some one mode of solving the question ;¹ for, though lawyers are not divided into sects, there are many ways, for example, long experience as a criminal lawyer or as a corporation lawyer, in which a lawyer's mind eventually forms habits. No discredit attaches to judges unconsciously affected by the hardship of a case or by political opinions or by professional habits of mind. With broad charity — or possibly with gentle cynicism, — lawyers recognize that judges cannot be expected to free themselves from their mental history and from the weaknesses of common men. Further, it is even recognized that an upright judge may be moved by popular clamor ; and hence, in some jurisdictions, provision is made for removing cases

of the Supreme Court who were included in the electoral commission then appointed, voted on party lines no less steadily than did the senators and representatives who sat on it."

Yet not one of the authors cited hints that the judges in question intended to act unfairly.

See also Robinson's Forensic Oratory, § 96, and W. D. Coles, "Politics in the Supreme Court of the United States," 27 Am. L. Rev. 182 (1893).

¹ "In *Pole v. Fitzgerald*, Willes, 641, decided in the Exchequer Chamber, in the middle of the last century, on error from the K. B., it was held, after great discussion and consideration, that on an insurance of a ship for a voyage, it was not sufficient that the voyage be lost, if the ship was safe. It was declared that the insurance was of the ship and not of the voyage, and the decision was affirmed in the House of Lords, notwithstanding Lord Mansfield made a very strong argument against it in his character of counsel. After Lord Mansfield came into the Court of K. B., he introduced and established the doctrine which he had maintained as counsel. . . . This, according to Lord Eldon, was an act of the King's Bench, reversing a judgment of the Exchequer Chamber and the House of Lords." 3 Kent's Com. 327-328. *Pole v. Fitzgerald*, however, eventually was recognized as laying down the proper doctrine, and Lord Mansfield's view was discarded. 2 Parsons on Marine Ins., 183, n. (3); 3 Kent's Com. 333, n. (1).

when local prejudice prevents the litigants from receiving unbiassed attention from either judge or jury.¹ Hence it is

¹ In *City of Detroit v. Detroit City Railway Co.*, 54 Fed. Rep. 1, 5, 17-20 (U. S. C. C., E. D. Mich., 1893), Taft, J., pronouncing the opinion of the court with reference to the sufficiency of an affidavit for the removal of a suit by reason of prejudice and local influence, said: "They say that the only question at issue in this suit is one of law, and that questions presenting only questions of law are not removable under the statute, for prejudice and local influence. . . . The contention of counsel is that the prejudice and local influence which Congress had in mind was that which would operate upon a jury, and that it never could have supposed that a State judge would be affected thereby in deciding questions of law. We are clear that this claim of counsel cannot be supported. . . .

"The city of Detroit is a municipal corporation, forming a large part of the county of Wayne. The judges of the Wayne circuit court are elected by the qualified electors of Wayne county. . . . The present judges are all candidates for re-election. The affidavit closes with this positive statement: . . . 'That by reason of the prejudice and ill-will existing against the said street-railway company, . . . as above set forth, and the determination of the public and the public authorities that said railway company shall be defeated, if possible, in anything which it undertakes or proposes, the judges of the Wayne circuit court are placed in a most trying and embarrassing situation, and are subject to constant and persistent importunity and public pressure; and justice requires that they should not be called upon to determine the questions in issue. . . .'

"If the facts stated in the affidavit, of which we have only mentioned a part, do not show prejudice and local influence in the community of the city of Detroit against the defendants in this case and in favor of the city as complainant, then it is difficult to imagine facts that would. . . .

"It is contended by counsel, however, that, even if prejudice and local influence be shown, there is no evidence that by reason thereof the defendant will not obtain justice from the judges of the Wayne circuit court. The 'justice' which the defendant must be prevented from obtaining in the State court to entitle him to a removal is certainly not a judgment or decree in his favor. The phrase does not refer to any particular result in the case, but rather to the influences which will operate upon the tribunal in deciding it. The 'justice' which defendant has the right to obtain is a hearing and decision by a court

obvious that the critic of cases cannot ignore the personal equation of the judges.

wholly free from, and not exposed to the effect of, prejudice and local influence. If it is made to appear to the United States court that prejudice and local influence do exist, which would have a natural tendency to operate directly on the State court, and furnish an interested motive for the judges to decide the case against the petitioning defendant, it is the duty of the United States court to grant the removal, without any inquiry into the fact whether the particular State judges before whom the case is pending could and would rise above such prejudice and local influence, and decide the case unmoved by any personal benefit or disadvantage which would follow their decision. In a majority of cases, doubtless, the State judges would do their duty without fear or favor, but the petitioning defendant is not to be exposed to the chance that prejudice and local influence may work against him. The existence of local influence, and its natural tendency to operate upon the court, being shown, the tribunal is no longer one in which, in the sense of the removal statute, 'justice' can be obtained.

"A decision in this case adverse to the city of Detroit would probably cause many electors of the city in the approaching judicial election, convinced of the righteousness of the city's cause, to vote against the judge rendering the decision; and no judge could be unconscious of that fact in passing upon the case. . . . There is nothing here to show that the judges . . . would not rise above influences of a personal character, and render a just decision; but the adverse influences of a personal nature are present, and in such a case we must presume a human weakness in all judges to prevent injustice from the frailty of a few. It is by force of a presumption of like character that all judges are held to be disqualified because of a pecuniary interest in the event of a suit. At common law the ownership of a single share of stock in a corporation, which is party to a suit, absolutely disqualifies a judge to hear it. *Dimes v. Junction Canal*, 3 H. L. C. 759. It is held by some courts that where a judge is a tax-payer of a county he cannot hear a case in which the county is interested. *Peck v. Freeholders*, 21 N. J. Law, 656; *Pearce v. Atwood*, 13 Mass. 324. No one claims that in many of such cases the judge is not able to discard utterly from his consideration of the merits of the case every motive of pecuniary interest, but the policy of the law forbids that litigants should be exposed to the possibility of bias arising therefrom. If disqualification is presumed

§ 62. *Ex Parte*.

If an opinion is rendered not in the course of hostile litigation, but substantially *ex parte*, it is not of the highest authority, for neither counsel nor judges can be supposed to have exerted themselves to the utmost.¹ This is one objec-

in a judge because of a pecuniary interest in the suit, however small, we think it reasonable, under a statute in terms framed to protect non-resident litigants from injustice arising from prejudice and local influence, to presume that judges, dependent for their election and continuance in office upon the suffrages of a community, are disqualified to hear and determine a legal controversy between a non-resident and that community, when it is clearly shown that the community has prejudged the case, and would be likely to visit the judges, in case of an adverse decision, with its ill-will. Without such a presumption as this, the statute would be a dead letter in all cases to be heard by a judge without a jury, for, in the nature of things, direct proof that a judge would be influenced by public sentiment and a desire for re-election would be impossible. Congress could never have intended the Federal judges to pass on the personal qualities of an individual State judge every time an application is made to remove a suit in equity from a State court under the statute. . . .

"It is said that at common law prejudice was never a ground for challenge to a judge. That is true. Interest was the only ground of disqualification. Favor would not be presumed in a judge, and it was, at common law, no ground for excepting to a judge that he was related to either party. *In re Dodge & Stevenson Manufacturing Co.*, 77 N. Y. 101, 112; *Inter Brookes and the Earl of Rivers*, Hardr. 503. But public opinion has grown more sensitive, and now by statute in most of the States relationship to the parties, and several other grounds unknown at the common law, disqualify a judge. In several States a party may, under the statute, except to a judge for personal prejudice or bias. . . .

"Men may be unconsciously influenced by personal motives, and public policy will not trust any judge, however great and pure, when such motives are present."

¹ "The case of *Boteler v. Allington* ought not to be relied on as an authority, because that was an amicable suit; and the bill was filed merely to remove all doubts." *Doe v. Hicks*, 7 T. R. 433, 437, (1797), *per* Lord Kenyon, C. J.

tion to an opinion rendered, as may happen in some States, upon the request of the legislature to know in advance of actual litigation whether a statute is constitutional or whether certain powers belong to certain officers.¹ The same objection lies against the decision of a court of last resort in a proceeding in error taken in a criminal case in behalf of the State, the accused having been acquitted and being free from the jeopardy of another trial ; but this procedure is found in few jurisdictions.² A common example of substantially *ex parte* proceedings is a request for the construction of an instrument creating a trust, if there is no dispute among parties and if the purpose is simply to secure a judicial construction as a protection for the trustees against possible future criticism.

5. *The court.*

§ 63. Lower Courts.

A decision of a court not of last resort is usually not of high persuasive authority.³ Even when such a court is composed, as often happens, of learned and experienced judges, both counsel and judges know that the case will probably go higher, and consequently the work of the court may lack thoroughness.⁴ Yet if a court of inferior jurisdiction is controlled by a judge of known learning and experience, the persuasive authority of its decisions may approximate,

¹ See §§ 5, and notes, 27. And see J. B. Thayer, "American Doctrine of Constitutional Law," 7 Harv. L. Rev. 129, 153 (1893).

² This procedure is found in Iowa. It has given rise to an editorial note in 28 Am. L. Rev. 85 (1894), which insists that the procedure is really not judicial in its nature.

³ See §§ 85-90.

⁴ Thus Lord Kenyon, C. J., said in *Goodright v. Rich*, 7 T. R. 327, 334 (1797): "Then it was urged that two cases have been since determined at Nisi Prius the other way: but they were only decisions at Nisi Prius, where perhaps the subject was not so well considered." See § 42.

and even surpass, the persuasive authority of some courts of last resort.¹

§ 64. Some Courts not highly esteemed: Unusual Question: Remote Jurisdictions.

There are some courts of last resort whose opinions, because of real or fancied lack of learning, are not regarded as of great value. Again, there are courts whose opinions upon some subjects have much greater persuasive authority than their opinions upon others. An obvious objection lies against an opinion upon a question with which the court cannot be supposed to be familiar, for example, a decision on admiralty law by an inland court; but, conversely, an obvious weight attaches to an opinion upon a commercial question delivered by a court sitting in a great commercial state. Again, cases from neighboring jurisdictions sometimes have greater weight than cases from remote States, partly because it is natural to wish the law of a State to harmonize with the law of its neighbors, and partly because it is comparatively difficult to ascertain the reputation of a remote court. There are, it is true, a few courts whose decisions, no matter what the subject-matter may be, have great persuasive authority in all parts of the country. Most of these are courts of those older States whose decisions — and statutes also, to some extent, — necessarily became the basis of the law in newer communities.²

¹ For example, great weight attaches to any opinion delivered by Coke, Hale, Holt, Lord Mansfield, Baron Parke, Chancellor Kent, Chief Justice Marshall, Justice Story, Chief Justice Shaw, or Chief Justice Gibson.

"The case before Lord Ch. J. Holt, . . . though only a *Nisi Prius* case, and that not an absolute decision, yet was the opinion of a judge whose name gives a sanction to everything he said." *Per* Lord Kenyon, C. J., in *Rotch v. Edie*, 6 T. R. 413, 423 (1795). And see §§ 13, 55, 59, 88-92.

² Mr. Justice S. F. Miller, "The Use and Value of Authorities," 23 Am. L. Rev. 165, 168-169, 172-173 (1889).

See §§ 74, 88-92, 130.

§ 65. Reversed : Courts often granting Rehearings.

The decision of an inferior court is so often reversed in the court above, that it is dangerous to rely upon a decision from which an appeal has been taken. Even when a case has been decided in a court of last resort, a similar destruction of the value of the decision may be caused by reason of a rehearing ; and, consequently, if a court of last resort is in the habit of allowing rehearings, its opinion is not a safe guide until the time for granting a rehearing has passed.¹ Hence caution is necessary in using cases published with prompt enterprise in the law periodicals.

*6. Subsequent state of the law.***§ 66. Overruled**

If the case has been overruled, it ceases to be of authority ; and if it has been doubted, distinguished, limited, or criticised, its authority, though not entirely swept away, may have been greatly weakened. The process of weakening a case may begin with a declaration that, either on account of its extraordinary circumstances or on account of the novelty or hardship of the rule laid down, the case should not be followed unless precisely the same circumstances arise. As precisely identical cases seldom occur,² it is easy to seize upon some difference whereby any subsequent case can be distinguished from the objectionable one. Thus, or by similar though less sudden descents, the case finally becomes valueless as a precedent. Such is the usual mode of overthrowing an objectionable case ;³ but sometimes a case is

¹ States in which rehearings are often asked are Virginia, Alabama, Louisiana, Texas, Arkansas, Indiana, Illinois, Minnesota, North Dakota, South Dakota, Nebraska, Kansas, Colorado, Washington.

² See § 6.

³ For example, *Walker v. Cincinnati*, 21 Ohio St. 14 (1871), is thus discredited by *Owen, J., in The State v. Pugh*, 43 Ohio St. 98, 120 (1885) : "It is no reflection upon the eminent judges who com-

openly overruled.¹ The attempt to avoid the appearance of overruling a case is due to the habitual conservatism of lawyers quite as much as to conscious respect for the principle *stare decisis*. It is obviously open to the objection that it conceals, or tends to conceal, what really is being done by the courts.² The careful investigator, however, is not misled by courteous language; but he is sometimes misled, or at least perplexed, by decisions that profess to follow old cases without a murmur and that really overthrow those cases.³

§ 67. Obsolete.

Occasionally, for example where a point involved is the court's view of public policy, a very old decision is weakened by lapse of time⁴ almost as if it had been overruled, the reason being that, the original grounds for the decision having disappeared by change of circumstances, the question if now for the first time litigated would probably be decided otherwise by the same court. This is an application of the maxim that when the reason of the law fails the law also fails.⁵ If, however, the old decision has been tacitly assumed as the foundation for other decisions or has become recognized by lawyers as an established rule of property, it cannot be said to be obsolete. Even when an apparently obsolete decision seems to stand isolated from all existing rules of law, there is a disinclination to disregard it, for there is a

posed this court at the time of that decision, however, to say that the announcement by this court that it is not eager to extend the application of the Walker case, would not be regarded as a menace to the rights or liberties of the people."

¹ See §§ 53, 93-96.

² Editorial note in 28 Am. L. Rev. 260 (1894).

³ Editorial note in 31 Am. L. Reg. N. s. 490 (1892).

⁴ Bishop's First Book of the Law, § 148.

⁵ *Cessante ratione legis cessat ipsa lex*. Broom's Legal Maxims, (5th ed.) 159; *German National Bank v. National State Bank*, 3 Colo. App. 17 (1892).

possibility that it really is related to existing rules and that a departure will result in confusion. Only when the grounds of the old decision are seen clearly to be obsolete or wrong, and when the old decision is seen clearly to have no entangling connection with any existing rule of law, is it safe to disregard the old decision and to adopt a new doctrine. Indeed, so conservative are lawyers, that the strong tendency is to attempt to support an old doctrine by even imagining in its behalf a reason wholly impossible; and the result may be not only to preserve the old doctrine but even to extend it along lines never conceived by the founders of it.¹

§ 68. Not followed.

If a case has not been cited in any later case, that is a good ground for contending that it has not been considered of high authority.² Yet this criticism must be received with the qualification that some cases have decided elementary questions once for all, and that, the questions not being litigated again, citation of those cases has been unnecessary. Clearly, however, a case is much strengthened by frequent citation and approval.³ By such citation and approval, even a *dictum* may become forcible authority.⁴

¹ Holmes' Common Law, 5.

And see §§ 53, 74-78, 84, 93-96.

² "But, though we are quite satisfied that the case of *Godsall v. Boldero* was founded on a mistaken analogy, and wrong, we should hesitate to overrule it, though sitting in a court of error, if it had been constantly approved and followed, and not questioned, though many opportunities had been offered to question it." *Dalby v. India and London Life Assurance Co.*, 15 C. B. 365, 392 (1854), *per* Parke, B., in the Exchequer Chamber.

³ See §§ 53, 66.

⁴ It is thus that the view stated in *Adams v. Lindsell*, 1 B. & Ald. 681 (1818), as to the time when a letter of acceptance takes effect, though unessential to the decision of that case, has now become the accepted rule in almost all jurisdictions.

CHAPTER VI.

COMBINING AND COMPARING CASES.

§ 69. When Combination and Comparison of Cases must be undertaken.

Thus far the discussion has been confined principally to the method of examining any one case. Little has been said of the course the student should pursue when he has several cases to consider, no one of them by itself deciding the very point to which his attention is directed. This emergency often arises, and then the student, having collected several cases bearing more or less directly upon the point, attempts by combination and comparison to ascertain what doctrine is to be deduced from the cases taken together.

§ 70. The Method of combining Cases.

Let us suppose that the student wishes to determine whether, when an hypothetical case stated to him contains only a certain group of circumstances, there is a good cause of action. He finds a case deciding that there is a good cause of action if to the supposed group of circumstances another group is added. He finds another case deciding that there is no cause of action if the second group of circumstances stands alone. He finds still another case deciding that the original group of circumstances and a third group, if taken together, constitute a good cause of action, and another case deciding that the third group taken alone will not do. And so on. Step by step, by thus combining cases, he may more or less certainly arrive at the conclusion that the original group of circumstances is the

efficient feature in the cases, and will give a good cause of action if taken by itself. The method is obviously similar to the methods of induction pursued in other sciences. The student of law is deprived of one of the most valuable processes of most other sciences, in that he cannot make experiments; but he can observe the results of many thousands of experiments as recorded in the reports.¹

§ 71. Combinations made unconsciously.

The process just now explained may appear to be intricate and laborious, but it is pursued, more or less unconsciously, by every lawyer. Whenever a lawyer attempts to discover the necessary doctrine of a reported case, one part of the process, as heretofore pointed out,² consists of casting aside immaterial features. The immaterial features are features that have been decided to be immaterial by other cases, or that, in the lawyer's opinion, would certainly be decided to be immaterial. The lawyer may hardly know that he casts aside certain features. Still less may he realize the reason why he casts them aside. Long ago he may have read a case justifying him in ignoring some features of the case now before him; or he may be acting upon knowledge that came to him through a text-book; or he may be simply following his own reasoning faculties, which for years have been trained to think along the lines pursued by his most learned predecessors in the profession.³ Certain it is that for one reason or another he does cast aside many of the circumstances of the case under examination, for example, the identity of the parties, the time of the transaction, the things that were the subjects of the contract or of the tort; and, without knowing that he has really been combining the results of numerous actual or hypothetical cases, he discovers the doctrine established by the case

¹ Bishop on Contracts, § 217, n. (3).

² See §§ 6-10.

³ See § 10.

that is under his eye. That he has actually been combining one real or hypothetical case with another can be shown very easily. Ask him whether the fact that the parties are B and C is important. He will answer that, in the absence of some unusual disability, the rule is the same as if the parties were D and E. Ask him whether the dates are important. He will answer that, in the absence of the Statute of Limitations or some similar rule, if there were other dates the result would be the same. And so on.¹ Each of his answers is the result of a hasty contemplation of some real or hypothetical case differing from the reported case under consideration; and his deduction from the reported case under consideration is the result of combining those real or hypothetical cases with that reported case.

§ 72. Hypothesis: Comparison.

Even when there is no one case that can be made to establish a doctrine in the manner explained in the preceding section, and when, consequently, the doctrine has to be derived by combining cases that differ in apparently important particulars from the hypothetical case propounded for solution, the most difficult method of deriving the doctrine is seldom pursued. The most difficult method is to enter upon the investigation with no prepossession regarding the doctrine that is to be found in the cases, and then to study the cases carefully, noticing what groups of circumstances lead to certain results and what groups lead to other results, and so on, until the effect of each separate circumstance or group of circumstances appears. What almost universally happens, however, is that the investigator starts with a preconceived notion of what the doctrine will probably be found to be. From *dicta*, or from text-books, or from the analogies of the law, or merely from the needs of his client, he has framed, perhaps roughly, a proposition for which he

¹ See § 6.

expects to find authority.¹ With this proposition, or hypothesis, in mind, he takes up the cases one by one, and, by using all the means described in the foregoing chapters, tries to show that the cases either establish the proposition or do not conflict with it or are open to criti-

¹ "Let us turn now to the lawyer who advises on a new case. . . . His first step is to get a clear conception of the facts of the case; such facts, that is, as are likely to be material to the legal result. . . . He will then guess provisionally to what department of law the case belongs. The rightness of the guess may at this stage be a matter for any degree of belief between perfect certainty and extreme doubt, according to the complexity of the facts. He will then know whereabouts to look, either in a text-book or in his memory, for the law which seems to be applicable. In one or other of these stores of knowledge, or partly in the one and partly in the other, he will find some general proposition, together with a reference to one or more reported cases on which it is founded. It may happen that this general proposition is one of those which are so well established that it is thought needless to discuss the original authorities for them, and it may also happen that being of this nature it is obviously applicable to the case in hand. When this is so the lawyer will seek no farther. But if the rule is either not perfectly settled and familiar, or not obviously applicable, then if he is a sound lawyer he will attend as little as possible to the form in which the general proposition is expressed, but will proceed to study the particular cases from which it is collected, examining their points of likeness and unlikeness to the case before him. He considers the legal results of the various sets of facts already decided upon in the reported cases, making various provisional hypotheses if need be, and correcting them as he goes along, and finally he draws an inference as to the probable legal effect of the facts he is desired to advise upon, and expresses that inference in his opinion. At this final stage, again, the state of his mind may, according to the nature of the case, be anything from extreme confidence to extreme doubt. . . . The success of these operations depends on the manner in which the work of selection and comparison is performed in each case. The inquirer must first discern rightly which are the material conditions of the question, and then he must assign the question to its proper class; in other words, he must select the right kind of cases for comparison with the case before him. And, lastly, he must observe the right points of likeness

cism.¹ This process may be called the comparison of cases; and it is a comparison of cases not so much with one another as with the anticipated doctrine.²

and unlikeness in the cases he compares." Pollock's *Essays in Jurisprudence*, 247-249.

And see §§ 120-131.

¹ Here again the analogy to the procedure of investigators in other branches of science is obvious. The frequency of such analogies suggests that a training in experimental science is a valuable preparation for the study of law.

² "Now I want to say a word about difficulties, little points as they seem to you, which you do not quite understand, because in the investigation of truth or the acquisition of knowledge there is nothing more precious than a little difficulty: it is often the key to the whole matter. First state the difficulty to yourself with the utmost precision of which you are capable, see what is the exact point of ignorance or the exact nature of the opposing inferences. Sometimes the whole difficulty disappears in the effort to state it to yourself. But if it remain, carefully dwell upon it until it either disappears, or as is sometimes the case destroys or subverts the whole structure of argument or inference or conclusion in which at first it appeared only like an insignificant flaw. A difficulty is sometimes of more value than the thing in which it thus seems a mere incident; just as in science a residual phenomenon will sometimes pull down the hypothesis which has explained everything else, or as in manufactures the waste product sometimes in the end proves of more value than the product to which it was thought to be mere refuse. The older naturalists had framed a complete theory of genera and species but neglected variations; and yet these despised variations became in the hands of Mr. Darwin the key to the history of creation. The old gas-workers threw away their gas-tar, but in the hands of the modern chemist this is a product perhaps more valuable than gas itself. The little difficulty that Socrates felt, after he had listened to the eloquent speech of Protagoras on the nature of virtue, grew into an attack on the whole position of the great sophist. And so with you in the investigation of facts, and in the drawing of inferences from them, there must be no little fact left inconsistent with your inferences, — in the statement of a principle of law there must be no possible application of that principle which leads to an impossible or inadmissible conclusion.

"In this respect, the methods of the lawyer and the man of science are closely akin; to both of them nothing is too small for study or

investigation, and this is one (but not the only) reason why to the onlookers their investigations often seem so tedious. They are interested perhaps in the general inquiry, in the broad texture of the argument; but they are impatient whilst the advocate keeps on pulling at some little thread in the fringe: but sometimes the thread unravels the whole web." Sir Edward Fry's address on "Some Aspects of Law Teaching," 9 *Law Quarterly Review*, 115, 127 (1893).

CHAPTER VII.

THE GROWTH OF LEGAL DOCTRINE.

§ 73. Applying established Doctrines.

When a court is asked to decide a case, the real question is how the principles of law shall be applied to the circumstances of the supposed case. If the necessary principles are already known, whether ascertained by relying upon some of the secondary authorities, such as text-books or digests, or by examining the original authorities, that is to say, the statutes or the reported cases, the principles thus ascertained are applied to the case by a process of reasoning which is an inversion of the process by which from any reported case the principle of law is deduced.¹

§ 74. New Doctrines needed.

Suppose, however, that in the jurisdiction there are no known propositions of statutory or of case law which solve the case at bar. The court will examine the cases decided

¹ See § 9 and notes. The given general principle or principles must be taken as major premises, from which, in combination with the minor premise, that is to say, a statement that the circumstances of the case at bar bring the case within the general principle, the conclusion readily follows. Clearly this is an example of deductive reasoning.

"At the present moment a rule of English law has first to be disentangled from the recorded facts of adjudged printed precedents, then thrown into a form of words, varying with the taste, precision, and knowledge of the particular judge, and then applied to the circumstances of the case for adjudication." Maine's Ancient Law, (Am. ed.) 13.

in other jurisdictions, in order to ascertain whether by the courts in those jurisdictions the necessary propositions have been established,¹ and, if the court finds such propositions laid down by reputable courts and sustained by strong reasoning, the court almost certainly will follow the rulings of those other courts ; for, though a decision has no binding force as a precedent beyond the jurisdiction in which it is pronounced, legal reasoning is the same everywhere, and what has been approved by one court is likely to be approved by another. If, however, the court cannot find the necessary propositions in other jurisdictions, or if it cannot approve the propositions that it finds there, or if it finds conflicting decisions, it attempts, by choosing among competing decisions and competing analogies, to decide the case at bar in accordance with some general principle that harmonizes with the analogies of the law and with justice.²

§ 75. The Law grows.

Thus the law grows ; or, to use another form of words, thus doctrines apparently new are proved to be part of the law. Creeping on slowly from point to point, the cases appear to demonstrate that old law has been added to, has been modified, and sometimes has been wholly swept away.³

§ 76. Does Law grow by judicial Legislation ?

Here arises a question as to which there is great difference of opinion. Does the new doctrine involved in the court's decision upon a wholly new case become law by virtue of

¹ See §§ 54, 88-90.

² See §§ 60, 77, 84.

Robinson's Forensic Oratory, § 151 ; Holmes' Common Law, 1-2.

³ This is seen by an examination of collections of cases on any one point, arranged chronologically. See, for example, Ames' Cases on Bills and Notes. When cases are overruled, perhaps the result is more properly described not as a growth but as an amendment of the law.

the decision ; or was it law already? Do the decisions create law ; or do they simply illustrate it? Do judges make law ; or do they simply declare it?

§ 77. The Lawyers' View.

The view long held by all lawyers, and still held by many of them, is that decisions merely illustrate law and that judges simply declare law.¹ According to this view, law develops as necessity arises for it, and thereupon is discovered by judges and other learned persons. In favor of this view appeal may be made to the fact that judges certainly shrink from appearing to establish a new doctrine. Their attitude of mind implies that the proposition exists already and merely needs to be discovered and declared.² They do not consider that they have arbitrary power to make law. Their whole professional training makes them shrink from asserting that they can legislate. Legislative power and judicial power they consider to be wholly separate functions. If they do legislate, they certainly do so under protest and upon the

¹ See § 14.

"Judges ought to remember that their office is *jus dicere*, and not *jus dare* ; to interpret law, and not to make law, or give law." Bacon's Essay "Of Judicature," 6 Works (Spedding's ed.), 506.

² "By a legal fiction it is supposed that the law contains within itself the materials for the decision of every case, however novel in its circumstances ; and, accordingly, when the judges have a new case before them they do not profess to arrive at the law by reasoning, by theory, or by philosophical inquiry, but they profess to discover it by searching among the records of former decisions for cases which are supposed to be analogous to the case before them ; and they derive from these analogies the rule which they desire for the determination of the particular case. . . . We are therefore led, whenever society gives birth to new combinations of circumstances, to the obligation of finding the rules which are applicable from such analogies as can be drawn from previous decided cases." The Lord Chancellor's (Lord Westbury's) Speech on the Revision of the Law (Macqueen's ed.), 13-15.

theory that, so to speak, they are adopting merely declaratory statutes. Their assumption is that every conceivable problem can be solved by propositions of law now existing, perhaps not directly by propositions already discovered, but certainly by propositions that can be deduced by any trained lawyer who will carefully reason from recognized propositions and will extend the application of such propositions in such manner as the nature of new problems may demand.¹ Perhaps an accurate statement of this common or lawyers' view is that the law consists of principles already recognized, *plus* lawyers' methods of reasoning, *plus*, finally, the requirements of justice. In other words, according to this view law consists of historical reasons (precedents), analogical reasons (lawyers' logic), and moral reasons (justice).² Obviously,

¹ "The precise facts . . . have never, as far as we can learn, been adjudicated upon in any Court; nor is there to be found any opinion upon them, of any of our judges, or of those ancient text-writers to whom we look up as authorities. The case, therefore, is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves, according to our own judgment of what is just and expedient. Our common-law system consists in applying to new combinations of circumstances, those rules of law which we derive from legal principles and judicial precedents: and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of the law as a science." *Per Parke, J., Mirehouse v. Rennell*, 8 Bing. 490, 515-516 (1832), s. c. 1 Cl. & F. 527, 546.

² If a case is opposed to the law as thus defined, it is said to be bad law; but, nevertheless, it is authoritative within the jurisdiction until overruled. See §§ 49, 50, 53, 59, 66, 86-96.

law as thus defined can solve any problem, however new ;¹ and, accordingly, from this point of view the growth of law appears to be a growth by means of discovery and not by means of creation.

§ 78. The analytical Jurists' View.

The analytical jurists, however, hold that the common law, or case law, is a creation of the courts, and that it is as truly the result of judicial legislation as statutes are the result of ordinary legislation.² They appeal to the undoubted fact that the known law has grown and to the other undoubted fact that the most visible cause of its growth is found in the decisions of the courts. They admit that the courts, even when establishing new doctrines, consider themselves bound by the dictates of justice and by the analogies of the law;³ but they may say with truth that members of legislatures usually consider themselves to be bound by the same general standards. In short, analytical jurists insist that there is judge-made law, and that chiefly by means of judicial legislation is the common law kept abreast of the necessities of the times.

¹ See § 84.

² The old, or lawyers', view will be found in 1 Bl. Com. 63-64, 68-71; 1 Kent's Com. 471-479; Bishop's First Book of the Law, §§ 71-106, 131, 161, 179, 454-469; Bliss on Sovereignty, 38-46; J. C. Carter's address on "The Ideal and the Actual in the Law," in 24 Am. L. Rev. 752 (1890); and Hammond's note 30 to 1 Bl. Com. *69. The modern, or analytical jurists' view will be found in Austin's Jurisprudence, lectures xxx. and xxxvii.-xxxix., and especially at pp. 218, 523, 531-533, 536-548, 620-666, of the fifth edition; Maine's Ancient Law (Am. ed.), 25, 29-32; Amos' Science of Law, 53-71; Holland's Jurisprudence (6th ed.), 57-61; and Holmes' Common Law, 35-36. Hammond's note and the passages in Austin give the best view of the controversy. The radical cause of the dispute, so far as it is not a mere difference as to nomenclature, is the question whether Austin's definition of law is applicable to England and the United States. See also §§ 14, 53, 82-84.

³ Holmes' Common Law, 35-36.

The analytical jurists have a decided advantage ; for their view, besides being capable of clear statement, appeals to one's own perception of what happens by virtue of a decision upon a new point. Further, they can appeal to doctrines recognized in courts. One of these doctrines is that, when a statute already in force in one jurisdiction is enacted in another, the judicial constructions placed upon the statute in the first jurisdiction are received in the second jurisdiction as in effect part of the statute.¹ Another doctrine, not however fully developed and unvaryingly applied, is 'that if in any jurisdiction a court of last resort decides a question in one way and later overrules that decision, transactions occurring after the first decision and before the second one and dependent for their validity upon the doctrine of the first decision will be upheld substantially as if the first decision had been a statute ; and this clearly is a repudiation of the view that a decision simply declares pre-existing law and that an overruling decision shows what the law always has been.'²

Persons holding that judges actually make law do not agree as to the value of this legislative function. Some of them denounce judge-made law, either upon the ground that it is the fruit of usurpation or upon the ground that the source of it is concealed and misrepresented or upon the ground that it is retroactive.³ Others consider judge-made

¹ *Commonwealth v. Hartnett*, 3 Gray (Mass.) 450 (1855), s. c. Beale's Cas. Crim. Law, 701.

² *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175 (1863), s. c. *infra*; *Farrior v. New England Mortgage Security Co.*, 92 Ala. 176 (1890), s. c. *infra*. Cf. *Woodruff v. Woodruff*, 52 N. Y. 53 (1873). See 1 Story's Eq. Jur. (13th ed.), 121-122, note; J. B. Heiskell, "Retrospective Decisions," 22 Am. L. Rev. 523 (1888); Conrad Reno, "Impairment of Contracts by Change of Judicial Opinion," 23 Am. L. Rev. 190 (1889); J. B. Thayer, "The Case of *Gelpcke v. Dubuque*," 4 Harv. L. Rev. 311 (1891); Holland's Jurisprudence, (6th ed.) 61.

³ "The other half is called *common law*, and is made—how do

law a normal growth, based on ancient and proper theories of judicial duty,¹ deplore the failure of lawyers to perceive that judges legislate, and hold that, even after statutory law has become much more comprehensive than it now is judicial legislation must remain a beneficent and necessary part of our system of government.

you think? By Mr. Justice Ashurst and Co, without king, parliament or people. . . . I say, by the judges, and them only; by twelve of them, or by four of them, or by one of them, just as it happens. This same law they vow and swear, one and all, from Coke to Blackstone, is the *perfection of reason*: the reason of which you are at no great loss to see. Their cant is, that they only declare it, they don't make it. Not they. Who then? Not Parliament, for then it would be not common law, but *statute*. . . .

"It is the judges . . . that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog; and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do*—they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it. What way, then, has any man of coming at this dog-law? Only by watching their proceedings: by watching in what *cases* they have hanged a man, in what *cases* they have sent him to jail, in what *cases* they have seized his goods, and so forth." 5 Bentham's Works, 235. "In the case of judge-made law, this retro-activity is of the very essence of this species of law, as contradistinguished from statute law." 5 Bentham's Works, 477.

And see 3 Bentham's Works, 223; 7 *id.* 260-261.

¹ See §§ 7, 14, 84-96, 99.

"The best and most rational portion of English law is in the main judge-made law. Our judges have always shown, and still show, a really marvellous capacity for developing the principles of the unwritten law, and applying them to the solution of questions raised by novel circumstances. Unfortunately they have, for reasons which it is not perhaps very easy to define, been far less successful in their interpretation of the written law or, in other words, of statutes. The moment that a principle is enunciated in the form of a parlia-

§ 79. Neither View essential.

For the purpose of this volume, either the lawyers' view or the analytical jurists' view may be accepted. The person who believes that the common law exists independently of the decisions of courts and that the decisions are merely illustrations of the law, admits that the decisions are the chief, and practically the only, source of our knowledge. So, too, the person who believes that the common law is made by the judges, insists that any one who is searching for the common law must study the decisions. Further, both persons study the cases in the same way, each of them following the processes explained in this volume ; and for the purposes of this volume it is immaterial that, when one investigator finds the doctrine of law involved in a case, he calls it the doctrine by the case illustrated, and that, when another investigator discovers the same doctrine, this latter investigator calls it the doctrine by the court established.

mentary enactment it is apt to become in the minds of English judges not the statement of a principle but a verbal rule, the meaning whereof is to be determined by rather narrow canons of interpretation." Editorial note in 9 Law Quarterly Review, 106 (1893).

CHAPTER VIII.

THE IMPORTANCE OF THE UNWRITTEN LAW.

§ 80. **The Bulkiness of the unwritten Law.**

Case law, as distinguished from statutory law, is usually called unwritten; for, though it is ascertained only by the examination of books, it is nowhere authoritatively worded.¹ The books from which the unwritten law is learned are the reports, as primary sources, and the digests and text-books, as secondary sources. In any law library the books from which the unwritten law is to be gathered far outnumber the books containing the written law. The shelves allotted to any State contain two or three volumes of revised statutes, probably a few dozen volumes of session laws, possibly a volume or two of municipal ordinances, and almost certainly from fifty to two hundred volumes of reports and digests. The shelves allotted to text-books may contain thousands of volumes; but certainly not more than twenty or thirty volumes treat of statutes or of statutory construction, and the others expound the unwritten law. Clearly the unwritten law is intricate and important.

¹ See §§ 13-16; Hammond's note 26 to 1 Bl. Com. *64 and note 32 to 1 Bl. Com. *79; Austin's Jurisprudence, lectures xxviii. and xxix.

"And when I call those parts of our laws *leges non scriptae*, I do not mean as if all those laws were only oral, or communicated from the former ages to the later, merely by word. For all those laws have their several monuments in writing, whereby they are transferred from one age to another, and without which they would soon lose all kind of certainty: for as civil and canon laws have their *responsa prudentum, consilia, et decisiones*, i. e. their canons, decrees, and decretal

§ 81. The Importance of the unwritten Law.

It is true that merely to compare the number of volumes devoted to written law with the much larger number devoted to unwritten law is to adopt an inaccurate method of ascertaining the relative scope and importance of the two kinds of law. The volumes of statutes are frequently large, and are always condensed to an extent not approximated by reports or even by text-books. Yet, after due allowance is made for the necessary inaccuracy of all numerical comparisons, it remains true that in England¹ and in almost any one of the United States the unwritten law is vastly more voluminous and more important than the written law. In every State, constitutional law has largely been reduced to writing. So, too, in most of the States, has criminal law. So has the law of wills determinations extant in writing; so those laws of England which are not comprised under the title of acts of parliament, are for the most part extant in records of pleas, proceedings, and judgments, in books of reports and judicial decisions, in tractates of learned men's arguments and opinions, preserved from ancient times, and still extant in writing.

"But I therefore stile those parts of the law *leges non scriptae*, because their authoritative and original institutions are not set down in writing in that manner, or with that authority that acts of parliament are; but they are grown into use, and have acquired their binding power and the force of laws BY A LONG AND IMMEMORIAL USAGE, and by the strength of custom and reception in this kingdom. The matters, indeed, and the substance of those laws, are in writing, but the formal and obliging force and power of them grows by long custom and use, as will fully appear in the ensuing discourse.

"The municipal laws of this kingdom, which I thus call *leges non scriptae*, are of a vast extent, and indeed include in their generality all those several laws which are allowed, as the rule and direction of justice and judicial proceedings, and which are applicable to all those various subjects about which justice is conversant." Hale's History of the Common Law (Runnington's ed.), 23-24.

¹ "The judgments of the Courts of Westminster Hall are the only authority that we have for by far the greatest part of the law of England." *Per* Best, C. J., *Fletcher v. Soudes*, 3 Bing. 501, 588-589 (1826).

and administration. So has the law of procedure. In almost all the States, however, the law of torts, of contracts, of insurance, of negotiable paper, of carriers, and of evidence, not to mention other subjects, remains unwritten, save that as to each of these branches there are probably in every State a few isolated statutory modifications.¹

§ 82. **Unwritten Law supplementing written Law.**

Even as to matters coming within the scope of written law the necessity for examining the unwritten law is not wholly removed. Constitutions, statutes, and ordinances have to be annotated, or even supplemented, by reported cases.² In the first place, the written law is usually expressed in technical words that cannot be perfectly understood without a study of the meaning attached to those words in the pre-existing unwritten law.³ In the second place, it is so difficult to word statutes clearly, that, even as regards a question that certainly was in the mind of the legislative body, the words of a statute are often so ambiguous as to require judicial interpretation or construction.⁴ In the third place, while it is conceivable that all questions which have

¹ In Louisiana, California, Georgia, and the Dakotas codification has progressed much farther than here indicated.

² **Sedgwick** on Construction of Statutes and Constitutional Law, chapters v.-vi.; **Potter's Dwarrris** on Statutes, chapters v. and ix.; **Cooley** on Constitutional Limitations, chapter iv.

³ "The Statute Law is in a great measure supplemental to the Common Law, and a knowledge of the Common is necessary in order to enable a man to read and understand the Statute Law." The Lord Chancellor's (Lord Westbury's) Speech on the Revision of the Law (Macqueen's ed.), 4.

⁴ This is what Coke says as to the difficulty of interpreting the language of statutes and of written instruments in general:—

"And to say the truth, the greatest questions arise not upon any of the rules of the common law, but sometimes upon conveyances and instruments made by men unlearned; many times upon wills intricately, absurdly and repugnant set down, by parsons, scriveners, and such other imperites: and oftentimes upon Acts of Parliament

heretofore arisen may be grasped by the legislative mind and may now be set at rest by carefully chosen language, it certainly is inconceivable that every question which has not yet arisen can be foreseen, and it is still more inconceivable that all unforeseen future questions can be provided for by the words of legislators who do not think of them.¹ No one,

overladen with provisoes and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law

"If men would take sound advice and counsel in making of their conveyances, assurances, instruments, and wills; and counsellors would take pains to be rightly and truly informed of the true state of their client's case, so as their advice and counsel might be apt and agreeable to their client's estate; and if Acts of Parliament were after the old fashion penned, and by such only as perfectly knew what the common law was before the making of any Act of Parliament concerning that matter, as also how far forth former statutes had provided remedy for former mischiefs and defects discovered by experience; then should very few questions in law arise, and the learned should not so often and so much perplex their heads, to make attonement and peace by construction of law between insensible and disagreeing words, sentences, and provisoes, as they now do.

"In all my time, I have not known two questions made of the right of descents, of escheats by the common law, &c., so certain and sure the rules thereof be." Preface to 2 Co., ix-x.

Commenting on the difficulty of interpreting statutes, Story says: "An anecdote told of Lord Coke may serve as an appropriate illustration. A statesman told him that he meant to consult him on a point of law. 'If it be common law,' said Lord Coke, 'I should be ashamed if I could not give you a ready answer; but if it be statute law, I should be equally ashamed if I answered you immediately.'" Story's *Miscellaneous Writings*, 449, citing *Teignmouth's Life of Sir W. Jones*, 268.

¹ "Such are the various modifications of which property is susceptible, so boundless the diversity of relations which may arise in civil life, so infinite the possible combinations of events and circumstances, that they elude the power of enumeration, and are beyond the reach of human foresight. A moment's reflection, therefore, serves to evince that it would be impossible, by positive and direct legislative authority, specially to provide for every particular case which may happen.

"Hence it has been found expedient to entrust to the wisdom and

however much he may favor codification, denies that in these three ways almost every provision of a constitution, a statute, or an ordinance needs, or conceivably may need, the aid of judicial decision, that is to say, of unwritten law.¹ The Statute of Frauds, for example, has given rise to thousands of reported cases; and an examination of those cases shows that the enactment of a statute does not prevent the law from growing.² Indeed, there are some statutes, for example the Statute of Uses³ and the Statute *de Donis Conditionalibus*,⁴ which have been construed in such a hostile spirit that they are sometimes said to have been thus partly or wholly repealed.⁵ It would be interesting, but for the purpose of

experience of judges, the power of deducing, from the more general propositions of the law, such necessary corollaries as shall appear, though not expressed in words, to be within their intent and meaning.

"Deductions thus formed, and established in the adjudication of particular causes, become, in a manner, part of the text of the law. Succeeding judges receive them as such, and, in general, consider themselves as bound to adhere to them no less strictly than to the express dictates of the legislature." 1 Douglas, preface, iii-iv.

¹ The codes of civil procedure adopted in many of the United States are the subject of almost innumerable decisions; but even an enemy of code pleading must admit that the questions of pleading and practice now litigated in code States have less direct bearing upon the final interests of the parties than had the questions that used to arise by reason of the niceties of common-law pleading.

² Browne on St. Frauds, introduction; article by Sir J. F. Stephen and Sir Frederick Pollock, "Section Seventeen of the Statute of Frauds," in 1 Law Q. Rev. 1 (1885).

³ Bispham on Eq., §§ 10, 53; Williams on Real Property (13th ed.), 161, 162.

⁴ Williams on Real Property (13th ed.), 44-48; Digby's History of the Law of Real Property (third ed.), 207-210.

⁵ "There is a whole science of interpretation better known to judges and parliamentary draftsmen than to most members of the Legislature itself. Some of its rules cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds. Our modern

this volume unprofitable, to discuss whether the modification and disappearance of objectionable statutes are proofs that judges legislate,¹ and whether other proofs to the same effect are afforded by the instances in which courts appear to have greatly enlarged by construction the provisions of constitutions and of statutes.²

§ 83. Codification: Continued Need of Case Law.

What has been said shows that codification cannot wholly remove the necessity for unwritten law. Codification can vastly reduce the bulk of the law and can set at rest many doubts that otherwise must for generations cause, as they have already caused, exasperating and expensive litigation; but, nevertheless, the codified law itself must be interpreted and construed, and principles must be discovered for the solution of questions not anticipated.³ In short, codification

law of real property is simply founded on judicial evasion of Acts of Parliament, which, however, was of such a flagrant kind as could not take place now-a-days." Pollock's *Essays in Jurisprudence*, 85.

"The least satisfactory portion of English law consists of judicial decisions on the interpretation of statutes." Editorial note, 9 *Law Q. Rev.* 207 (1893).

¹ See §§ 74-79.

² For a lively protest against a decision whereby the Supreme Court of the United States construed the statutory expression "high seas" as including the great lakes, and thus enlarged the jurisdiction of the Federal courts, see an editorial note in 28 *Am. L. Rev.* 304 (1894).

³ Commenting upon the common law, Sir Matthew Hale, in his preface to Rolle's *Abridgment* (1668), says:—

"1. The common laws of England are not the product of the wisdom of some one man, or society of men in any one age; but of the wisdom, counsel, experience and observation of many ages of wise and observing men: where the subject of any law is single, the prudence of one age may go far at one essay to provide a fit law, and yet even in the wisest provisions of that kind, experience shews us that new and unthought of emergencies often happen, that necessarily require new supplements, abatements or explanations: but the body of laws, that concern the common justice applicable to a great kingdom

must be a gradual process, recording from time to time the results of past decisions, amending the law in the points,

is vast and comprehensive, consists of infinite particulars, and must meet with various emergencies, and therefore requires much time and much experience, as well as much wisdom and prudence successively to discover defects and inconveniences, and to apply apt supplements and remedies for them; and such are the common laws of England, namely, the productions of much wisdom, time and experience.

"2. The common laws of England are settled and known; every entire new model of laws labors under two great difficulties and inconveniences, viz. first, that though they seem specious in the theory, yet when they come to be put in practice, they are found extremely defective; either too strait or too loose, or too narrow, or too wide, and new occurrences, that neither were or well could be at first in prospect, discover themselves, that either disjoint or disorder the fabric; and therefore such new models continually stand in need of many supplies, and abatements, and alterations, to accommodate them to common use and convenience, whereby in a little time the original is either wholly laid aside or in a great measure lost in its amendments, and become the least part of the law. Again, were such new entire models of laws never so good, yet it is a long time before they come to be well known or understood, even to those whose business it must be to advise or judge according to them. . . .

"3. The common laws of England are more particular than other laws, and this, though it renders them more numerous, less methodical, and takes up longer time for their study, yet it recompenseth with greater advantages, namely it prevents arbitrariness in the judge, and makes the law more certain and better applicable to the business that comes to be judged by it. General laws are indeed very comprehensive, soon learned, and easily digested into method; but when they come to particular application, they are of little service, and leave a great latitude to partiality, interest, and variety of apprehensions to misapply them; not unlike the common notions in the moralist, which when both the contesting Grecian captains most perfectly agreed, yet from them each deduced conclusions in the particular case in controversy, suitable to their several desires and ends, though extremely contradictory each to other. It hath therefore always been the wisdom and happiness of the English Government, not to rest in generals, but to prevent arbitrariness and uncertainty by particular laws, fitted almost to all particular occasions.

"If any man object, that if there be that excellency in the English

written or unwritten, in which it has proved unsatisfactory, anticipating and solving in the light of the present day some

laws, what is the reason there have been many changes therein in succession of times: I answer in general, that it cannot be supposed that humane laws can be wholly exempt from the common fate of humane things, which must needs be subject to particular defects and mutabilities; time and experience, as it hath given it the perfection it hath, so it must and will advance and improve it. But more particularly, the mutations that have been in this kind, hath not been so much in the law, as in the subject matter of it; the great wisdom of parliaments have taken off, or abridged many of the titles about which it was conversant: usage and disusage hath antiquated others, and the various accesses and alterations in point of commerce and dealing, hath rendered some proceedings, that were anciently less in use, to be more useful; and some that were anciently useful to be now less useful."

Almost two centuries later, W. M. Best, "Codification of the Laws of England," 1 Juridical Society's Papers, 213-215 (1856), wrote:—

"Another prevalent notion, and here again I can detect the influence of Bentham (see his Works *passim*), is that codifying the law would put an end to what is called 'Judge-made law,' which is assumed to be one of the principal evils of the English system. If the expression 'Judge-made law' is to be understood with reference to those cases where our judges have occasionally overstepped their authority by proceeding to make law instead of declaring it, there is no need to quarrel with the expression; at the same time it may be as well to observe that the faculty has not always been exercised for evil. In the reign of Edward IV. a piece of judge-made law emancipated the landed property of England from the insufferable mischief of entails; and when, in that of Henry VIII., an attempt was made by the Statute of Uses to tie up all land anew in the strictness of feudal tenure, a piece of judge-made law kept it free. But if by denouncing judge-made law the advocates of codification mean that, in making the decisions of judges binding on their successors, the law of England has proceeded on a wrong principle, I must dissent from the position, remarking however that the question has no *necessary* connection with that of codification. Every system of law, whether in the shape of a code or not, contains some provisions for its own interpretation; and if a code for this country were resolved on, one of the first questions its framers would have to settle would be, whether the decisions of judges on the meaning of expressions in it should have the force

future problems, and still leaving room and necessity for future development by means of the investigations of text-writers,¹ counsel, and judges.²

which judicial decisions have at present; or whether, as in France, the judges should be forbid to lay down general principles (Code Civil, liv. i. tit. Preliminaire, § 5), and should adjudicate on each case according to their individual views of the law respecting it. I cannot help thinking that the balance of advantage is on our side. The stability and certainty which the binding force of judicial decisions, until reversed by superior authority or the legislature, introduces into the legal system more than compensate for any evils that may arise from ill-considered or corrupt decisions; for, there being a certain amount of authority which the most profligate bench would not dare to disregard, the result of an appeal to the law can be predicted with tolerable accuracy. But when every tribunal is left unfettered to put its own construction on the language of the law, it requires a knowledge of the peculiar disposition and character of the members composing it to form even a guess at its decision. Moreover, although a judge be not *bound* by the decisions of his predecessors, it is impossible to prevent his forming his judgment by them; and we accordingly find that, notwithstanding the positive language of the French Code in the passage referred to, judicial decisions are reported and cited in France. And this introduces the greatest evil of all — a double principle of decision placed within the reach of the corrupt judge, — who is thus enabled in many cases to take for the ground of his decision either his own construction of the code or the decisions of his predecessors, and with safety to himself give judgment for either litigant party at pleasure.”

The third point taken by Sir Matthew Hale in the passage quoted in this note was thus phrased by Coke: —

“The reporting of particular cases or examples is the most perspicuous course of teaching the right rule and reason of the law.” 6 Co., preface, xvii.

¹ Text-books are sometimes spoken of as if they of necessity must be, like digests, mere indexes to cases. Yet a good text-book is much

² On codification see Austin's Jurisprudence, lecture xxxix., and pp. 1021-1039 of the fifth edition; Amos' Science of Law, 75-76, and chapter xiii.; discussion by David Dudley Field and others, in 20 Am. L. Rev. 1-47, 100-103, 249-252, 315-338 (1886).

§ 84. Summary.

Old sayings are that "reason is the life of the law,"¹ that "the common law itself is nothing else but reason," and more than an index. It treats a whole subject systematically, points out the reasoning upon which the courts more or less consciously rely, reconciles apparently conflicting decisions, sometimes indicates a conclusive reason for preferring one of several actually conflicting doctrines, and now and then suggests a solution of problems that have not yet arisen in practice. Such a book, besides serving as a guide to principles already established, gives material aid in the development of new doctrine. Amos' Science of Law, 69-70. As in the United States there are now more than forty courts of last resort, the task of reconciling decisions and of pointing out the best doctrine seems to require, and eventually to tend to create, text-books of the highest class.

¹ "For by the arguments and reasons in the law, a man more sooner shall come to the certaintie and knowledge of the law." Littleton's Tenures, *Epitologus*. Coke's comment is this: "*Ratio est anima legis*; for then are we said to know the law, when we apprehend the reason of the law; that is, when we bring the reason of the law so to our owne reason, that wee perfectly understand it as our owne; and then, and never before, we have such an excellent and inseparable propertie and ownership therein, as wee can neither lose it, nor any man take it from us, and will direct us (the learning of the law is so chained together) in many other cases. But if by your study and industrie you make not the reason of the law your owne, it is not possible for you long to retaine it in your memorie. And wel doth our author couple arguments and reasons together, *Quia argumenta ignota et obscura ad lucem rationis proferunt et reddunt splendida*: and therefore *argumentari et ratiocinari* are many times taken for one. . . . The law is unknown to him that knoweth not the reason thereof. . . . The knowne certaintie of the law is the safetie of all." Co. Lit. 394 b - 395 a.

Sir Matthew Hale, in his preface to Rolle's Abridgment (1668), said: "Men not much acquainted with the study of the common laws of England . . . pretend . . . against the study of the common law . . . that it wants clear evidence of reason, and that the conclusions and resolutions of it are not deducible by such evident rational consequence as is or may be done in other sciences, that it is obscure and perplexed, so that they that think themselves great masters of reason, yea, and many that are much conversant in subtilties of logic,

that the law is "the perfection of reason."¹ From this chapter and its immediate predecessor, it is obvious that

philosophy and the schoolmen, are at a loss in it, and can make little of it. . . It is certainly true, that reason is the common faculty and instrument of mankind for the acquist, application, and exercise of any knowledge or art, and they that have the clearest exercise thereof are ordinarily the best proficient in them. It is the same power of reason, that with exercise, study, and experience renders a man a good logician, a good mathematician, a good physician, a good lawyer; but yet the same man that is a good logician, is not therefore presently a good lawyer, mathematician, or physician. Take a man of the choicest natural parts, and turn him upon a piece of Euclid, or upon some parts of the physics or metaphysics, or logic of Aristotle (that great master of reason), he will be to seek to make anything of it, till by study and time he hath accommodated his reason to those subjects: and although the reason of some parts of the common law be obvious at the first view to every capacity, yet to get a mastery of the full knowledge of it, requires not only reason, but study and industry to understand it; and then his reason will trade upon that stock, and make deductions and inferences upon it in the same manner as the mathematician doth upon a proposition of Euclid. But, secondly, in matters moral and civil (the common subject of laws) though, possibly the general and common notions of them, or where-

¹ "And the law, that is the perfection of reason, cannot suffer anything that is inconvenient. . . .

"*Nihil quod est contra rationem est licitum*; for reason is the life of the law, nay the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason: for, *Nemo nascitur artifex*. This legal reason *est summa ratio*. And therefore if all the reason that is dispersed into so many several heads were united into one, yet could he not make such a law as the law of *England* is; because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection, for the government of this realm, as the old rule may be justly verified of it *Neminem oportet esse sapientiores legibus*: no man out of his own private reason ought to be wiser than the law, which is the perfection of reason." Co. Lit. 97 b.

these sayings, framed by lawyers who had in mind the unwritten law only, may be true, provided "reason" be

upon they are founded, are in a great measure common to all men of understanding, yet the applications and particular deductions and conclusions thereof are not so clear, constant, and determinate, as consequences and conclusions in logic or mathematics are; for as the natures of moral actions are in themselves much more indeterminate than the subjects of those arts and sciences, so they most commonly are strangely diversified by infinite circumstances; and therefore men agreeing in the same common notions of justice and morality, oftentimes deduce different conclusions from them, and applications of them, even although interest and partiality of mind (which are very incident to mankind) do not interpose. . . . The wisdom of laws, especially of England, is to determine general notions of just and honest by particular rules, applications, and constitutions found out and continued by great wisdom, experience and time, and thereby to settle that variety and inconstancy of particular applications and conclusions, which without some established rule would be found in most men, though of excellent parts and reason, and agreeing in common notions. Thirdly, in things that have their original much by institution, men cannot easily or ordinarily by rational deduction find them out, but only by instruction and education, and yet those things are of as great necessity and use to mankind as other matters more obviously deducible by argumentation: as for instance, in the significancy of speech, why such a composition of articulate sounds and syllables and words should signify such a subject, or such an intelligible proposition; and why one kind of composition in France, and another kind of composition in England, should signify the same thing; why in grammar the various terminations of words should render them of several imports and significations; no immediate reason can, be justly given or required, but institution or custom, which is a tacit institution. And something analogical to this is to be found not only in the English laws, but in all the laws in the world, wherein though the first institution thereof was not without great and profound reason, and the same is continued with great advantage to society, and prevention of incertainty in things; yet it were a vain thing to conclude it is irrational, because not to be demonstrated or deduced by syllogisms: thus in our law the word *dedi* creates a warranty, the word *concessi* creates a covenant; the word *heirs*, required to pass a fee simple in grants and feoffments; lands in fee simple descend to the uncle and not immediately to the father, and to the eldest son, not to

understood to include reasoning from precedents and from analogies and from the requirements of justice.¹ No doubt the sayings intend to suggest that reasoning based upon the requirements of justice is the ultimate source of law. In this sense also the sayings may be correct historically; but it must be conceded that in many instances the original ground of precedents is not now apparent. However, when precedents are obviously based upon obsolete conceptions, or are otherwise objectionable, the unwritten law provides a mode whereby they may gradually be brought into harmony with modern views.² When such a change is made, it is clear that an appeal has been taken to some other line of argument based upon precedent or analogy or justice; and the result, though it may not be the result that a mind unskilled in law would attain, is obviously based upon reasoning, and thus enforces the ancient eulogies of law.

As the unwritten law is capable of changing, it is sometimes called elastic; and it is also sometimes so called by persons whose real meaning is that as to many matters the unwritten law is not yet definitely settled.³ For elasticity of either sort, firmly established precedent tends to substitute rigidity.⁴ So does written law.

all the sons; though in some other countries their laws direct descents otherwise; and infinite other instances of like nature may be given, which have their force principally by virtue of institution, or of the common usage of this kingdom, which is a tacit institution, and are of great use to prevent uncertainty; therefore, as all the reason imaginable will not make a man a good grammarian, or skilled in any one language, unless he learn it by education, study, or discipline; so a man, though otherwise of pregnant reason, must not be offended if he be not born a common lawyer, nor be master of the knowledge of it without study and experience."

¹ See §§ 73-78.

² See §§ 53, 66, 67, 74, 93-95.

³ Stephen's Digest of Evidence, introduction.

⁴ "The System of Law Reports," 40 Law Magazine, 1, 5 (1847).

Yet written law, like precedent, can be modified by unwritten law.¹ When statutes enact existing doctrines of unwritten law, or modify them, or destroy them, the scope of the written law is enlarged ; and in a sense the scope of the unwritten law is thus diminished. At present in most States the greater and more important part of the law is unwritten.² Yet, even if the whole of the existing law were codified, there would still be a place for unwritten law ; for by decisions of the courts the written law must be explained and must be made to cover cases not anticipated.³

¹ See §§ 82-83.

² See § 81.

³ See §§ 82-83.

CHAPTER IX.

THE RESPECT FOR AUTHORITY.

§ 85. The Degrees and Kinds of Authoritativeness.

The question whether one case is more or less authoritative than another is largely a question of degree.¹ Yet it is also believed by lawyers that authority² is of several more or less perceptibly distinct kinds. To these several kinds of authority, or authoritativeness, technical names are not assigned. For convenience the several kinds are in this volume called imperative authority, persuasive authority, and *quasi*-authority.

§ 86. Imperative Authority.

In the court pronouncing a decision, and in courts subordinate to it, the common law makes the decision, in so far as it establishes a doctrine, as heretofore explained,³ a precedent of imperative authority, until it is either reversed or overruled.⁴ The theory of the law is that a case of imperative

¹ The points contained in §§ 37-68 deal chiefly with questions of degree.

² The authority that a decision has as to the litigation to which it pertains is to be carefully distinguished from the authority that a decision has as to other litigation. As to the very litigation, the decision is *res adjudicata* and binds the parties until reversal. The very same decision may have little or no weight as a precedent for other litigation. This volume deals with the force of decisions as precedents.

³ See §§ 20-26.

⁴ A decision is reversed when the very case is taken to a higher court, and the lower court is held to have committed error. A de-

authority is followed by a subordinate court without questioning and without distinguishing ; and this theory is practically followed, with the exception that if a court commits a perfectly obvious blunder a subordinate court, believing in good faith that the higher court would not repeat the decision, declines to follow, and with the other more important exception that if the decision, though not a blunder, is distasteful, the subordinate court declines to follow it in cases not identical.¹

§ 87. **The Justification for imperative Authority.**

There appear to be many reasons why a court considers itself imperatively bound by its own decisions, until they are reversed or overruled. In the first place, the old decision, being the work of competent and careful judges, was probably right.² Again, even though the old decision was wrong,

cision is overruled when the same court, or one of higher jurisdiction, pronounces a distinctly opposite decision in some other case. If as to some one point a case is either reversed or overruled, its authority is not diminished as to other points involved in it and not touched by the disapproval of the reversing or overruling court.

¹ See § 66.

² "It is true the decisions of courts of justice, though by virtue of the laws of this realm they do bind, as a law between the parties thereto, as to the particular case in question, till reversed by error or attain, yet they do not make a law properly so called (for that only the king and parliament can do) ; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times ; and though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons, as such, whatsoever :—

"First, because the persons who pronounce those decisions, are men chosen by the king for that employment, as being of greater learning, knowledge and experience in the laws than others. Secondly, because they are upon their oaths to judge according to the laws of the kingdom. Thirdly, because they have the best helps to inform

to many persons it seems that justice to the parties to the old case requires the new case to be decided as the old one was decided. Again, to depart from the old decision is to admit that the present judges or their predecessors committed a blunder. Again, to follow an accustomed line of thought is easier than to strike out a new one.¹ Again, one cannot foresee all the results to which a departure from an old doctrine will lead. Again, only by insisting upon obedience to precedent can the effect of judicial prejudice be reduced to a minimum.² Finally, thus only can one predict the result of litigation ; or, in other words, thus only can case law become a science³ and rights derived under it be certain and safe.⁴ Perhaps this enumeration of reasons is unnecessary, for certainly every one perceives without argument that uniformity is essential to law.⁵

their judgments. Fourthly, because they do *sedere pro tribunali*, and their judgments are strengthened and upheld by the laws of this kingdom, till they are by the same law reversed or avoided." Hale's History of the Common Law (Runnington's ed.), 67.

¹ Pollock's Essays in Jurisprudence, 50-57, 239-240.

² See § 61.

³ "Case Law and Inductive Science," quoted from the Pall Mall Gazette, in 8 Irish Law Times, 515, 10 Alb. L. J. 301, 8 Western Jurist, 732 (1874).

⁴ See §§ 6, 7, 53, 73.

⁵ The authority of precedents was recognized as early as the time of Henry III. Thus Bracton, writing in the middle of the thirteenth century, said : —

"I, Henricus de Bracton, have, for the instruction, at least of the younger generation, undertaken the task of diligently examining the ancient judgments of righteous men, not without the loss of much sleep and labor, and by reducing their acts, counsels, and answers, and whatever thereof I have found noteworthy, into one summary, I have brought it into order under titles and paragraphs." Bracton de Legibus (Twiss' translation), f. 1. "If, however, any new and unaccustomed cases shall emerge, and such as have not been usual in the realm, if indeed any like cases should have occurred, let them be judged after a similar case, for it is a good occasion to proceed from like to like.

The same reasons induce an inferior court to treat as of imperative authority the decisions of the courts to which it is subordinate; and in this instance there is an additional reason found in the fact that, if the inferior court should decline to recognize such decisions as of imperative authority, in the very litigation the inferior court would be reversed by the court above, the results being delay, expense, and judicial humiliation.¹

§ 88. Persuasive Authority.

Beyond the court pronouncing the decision, and beyond courts subordinate to it, the decision does not have imperative authority as a precedent. Yet, in so far as the decision

But if such a thing never happened before, and the judgment is obscure and difficult, the judgment should be referred to the great court." *Id.* f. 1 b.

"Nothing is more remarkable in Bracton's book than his profuse references to decisions. His law is case law. Now this is remarkable. It is very seldom indeed that any other mediæval writer, Fleta, Britton, Hengham, Littleton, ever cites a case, and citations in the Year Books are out of the common: seldom is there anything more definite than a vague 'It is so in our books.' Shall we say that Bracton foresaw what after the lapse of centuries became the most distinctive characteristic of English law? . . . In dealing with concrete matters he appeals not to Azo, nor Ulpian, nor again to Reason or Nature, but to this and that case adjudged by Martin Pateshull or William Raleigh." 1 Bracton's Note Book, Maitland's introduction, 11. "He cites as I reckon 494 cases." *Id.* 52. See also 10 Coxe's Güterbock on Bracton's Relation to the Roman Law, 40-47.

Coke explains that during the time covered by the Year Books counsel did not cite specific cases, but simply appealed in general terms to doctrines known to be established. 10 Co., preface, xxi.

In countries using the Civil Law, judicial decisions do not have as great weight as in countries using the English law. Holland's Jurisprudence (6th ed.), 59.

¹ Walker Marshall, "Is a Judicial Tribunal, either of the Last Resort or otherwise, bound by the Principles laid down by itself on Previous Occasions?" 2 Juridical Society Papers, 331, 334 (1860).

establishes a doctrine as heretofore explained,¹ the decision is recognized in all courts as of persuasive authority. Thus decisions of the courts of any State are cited in other States,² and decisions of lower courts are cited in courts of last resort.³ Further, English cases are cited in American courts,⁴ and American cases in English courts.⁵

¹ See §§ 20-26.

² See §§ 64, 74.

³ See § 63.

⁴ English decisions rendered prior to the colonization of America are treated as of imperative authority here. English decisions rendered after the independence of the United States have persuasive authority. An interesting, but practically unimportant, question, is whether English decisions rendered after colonization but before independence should be considered as having imperative authority, or as having only persuasive authority. See 1 Kent's Com. 69-70, 472-473; Mr. Justice S. F. Miller, "The Use and Value of Authorities," 23 Am. L. Rev. 165, 166 (1889). But see § 67.

⁵ "During the argument, a decision of the Chief Justice Marshall, in the Supreme Court of the United States, was cited as being contrary to the conclusion this Court has come to. . . We need not say we have the greatest respect for every decision of that eminent judge, but the reasoning attributed to him by that report is not satisfactory to us; and we have since been furnished with a report of a subsequent case, in which that authority was cited and considered, and in which the Supreme Judicial Court of Massachusetts decided, that in an action against two on a joint note, a judgment against one was a bar." *King v. Hoare*, 13 M. & W. 494, 506-507 (1844), *per Parke, B.*

"The case before us presents itself, therefore, so far as our Courts are concerned, as one of the first impression, on which we have to declare, or perhaps, I may say, practically, to make the law.

"I am glad to think that in doing so we have the advantage of the assistance afforded to us by the decisions of the American Courts and the opinions of American jurists, whom accident has caused to anticipate us on this question. And, although the decisions of the American Courts are of course not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of the law — a law, except so far as altered by statutory enactment, derived from a common source with our own — entitle

§ 89. The Justification for Persuasive Authority.

The reason why a decision has not imperative authority beyond the jurisdiction, is simply that if jurisdictions are independent of each other it is impossible that one should establish laws for the other. Yet; if any one glances at the reasons urged in behalf of imperative authority within the jurisdiction, he will see that most of the reasons, perhaps all, suggest with scarcely diminished force the propriety or naturalness of conceding beyond the jurisdiction a persuasive authority. It is inevitable that jurisdictions practising similar systems of law should wish their systems to be harmonious with one another. Even if this were not true, it would be inevitable and right that a court would attach weight to the well-considered opinion of any court composed of learned men.¹

§ 90. Distinction between Imperative and Persuasive Authority. Illustrations.

The distinction between imperative and persuasive authority is indicated by the fact that in the three old English superior courts having approximately concurrent and co-ordinate jurisdiction in Common Law cases,—the King's Bench, the Common Pleas, and the Exchequer,—decisions had imperative authority in the court pronouncing them, and merely persuasive authority in the others.² Decisions

their decisions to the utmost respect and confidence on our part." *Scaramanga v. Stamp*, 5 C. P. Div. 295, 303 (1880), *per* Cockburn, C. J.

"Whatever the strict technical aspects may be, there are probably few English lawyers who would not give—to put the case as low as possible—as much weight to a decision of the Supreme Court of the United States on a question of principle common to the two systems, as to a decision of that fluid tribunal—a Divisional Court." *Seven on Negligence*, preface, vii.

¹ Robinson's Forensic Oratory, § 150.

² "I take it to be abundantly clear, that the three superior courts of common law exercise an independent judgment upon any matter

of the House of Lords have imperative authority in all English courts, including the House of Lords itself.¹

Another important illustration of the distinction between imperative authority and persuasive authority is afforded by a consideration of the force of decisions rendered by the Federal courts. A decision of the Supreme Court of the United States has imperative authority in every Federal court. If it interprets the Constitution or treaties or statutes of the United States, it has imperative authority in State courts also; but if it does not deal with such questions its authority as a precedent in State courts is merely persuasive,

brought before them, and that, although the same points may have been decided in either or both of the other courts, the duty of such court is to consider it for itself; and it is at liberty to arrive at a different conclusion, and to give judgment against the party in whose favor the other court would, acting upon its own decision, have decided. The instances of conflict between the decisions of these tribunals are too numerous to admit of doubt being entertained of the fact — cases of conflict which do not arise from each court so deciding, ignorant of the judgment in the other; but where the one has repudiated the doctrine which it knows to have been laid down by the other tribunal." Walker Marshall, "Is a Judicial Tribunal, either of the Last Resort or otherwise, bound by the Principles laid down by itself on Previous Occasions?" 2 Juridical Society Papers, 331, 333 (1860).

¹ "The rule of law which your Lordships laid down as the ground of your judgment, sitting judicially, as the last and Supreme Court of Appeal for this empire, must be taken for law till altered by an Act of Parliament, agreed to by the Commons and the Crown, as well as by your Lordships. The law laid down as your *ratio decidendi*, being clearly binding on all inferior tribunals, and on all the rest of the Queen's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law, and legislating by its own separate authority." *Per* Lord Campbell, C., in *Beamish v. Beamish*, 9 H. L. C. 274, 338-339 (1861). Yet the House of Lords can overrule its decisions. See *Caledonian Railway Co. v. Walker's Trustees*, 7 App. Cas. 259, 275, 302 (1882).

thus resembling a decision in a foreign court.¹ A decision of a United States Court of Appeals, similarly, is of imperative authority in all Federal courts within the circuit, but in all other courts, including other United States Courts of Appeals and the Supreme Court of the United States, it has, as a precedent, persuasive authority only.

Finally, it is obvious that in Federal courts the decisions of State courts have at least persuasive authority. It is sometimes contended that when a cause of action arising in a State is made the subject of litigation in a Federal court the decisions of the court of last resort of that State should be treated in the Federal court as of imperative authority, upon the theory that the local decisions, like local statutes, make local law; but as to this there is an unsatisfactory confusion of doctrines, the present view appearing to be that in such a case as this the Federal court will treat a State court's decisions as of imperative authority in matters pertaining to real property and other such questions, and as of merely persuasive authority in matters pertaining to general law.² Unfortunately, at present it is difficult, perhaps impossible, to draw a bright line dividing local questions from general questions.

§ 91. Quasi-Authority.

In so far as a decision, if examined in accordance with the principles heretofore described for ascertaining the doctrine of a case,³ does not establish any given proposition of law, the decision is really of no authority at all; for it is not a precedent as to the given proposition. Authoritativeness

¹ Mr. Justice S. F. Miller, "The Use and Value of Authorities," 23 Am. L. Rev. 165, 169-170 (1889).

² *Swift v. Tyson*, 16 Pet. 1 (1842); *Burgess v. Seligman*, 107 U. S. 20 (1882); *Baltimore & Ohio Railroad Co. v. Baugh*, 149 U. S. 368 (1893). Upon this point material assistance has been derived from an elaborate investigation made by Professor J. C. Gray, and not yet published.

³ See §§ 20-26.

is conceded to precedents, and to precedents only. Hence in strictness a *dictum* has neither imperative nor persuasive authority. Yet a *dictum* does have weight, does tend to affect the decision of a subsequent case; and hence it may be said to have *quasi*-authority.¹ The weight of a *dictum* is greatest in the jurisdiction in which it was pronounced; but nevertheless, it seems useless to attempt to divide *quasi*-authority into two classes, imperative *quasi*-authority and persuasive *quasi*-authority.

Further, weight attaches to statements made by *amici curiæ*, by text-book writers, by authors of non-judicial written opinions, and by other persons learned in the law; and in each of these instances we recognize simply *quasi*-authority.

The weight given to *dicta* and the like is dependent largely upon the learning and reputation of the utterer. Some old text-books have very great weight; and so have the *dicta* of some famous judges. Yet no one forgets that text-writers do not have the advantage of listening to contentious argument, and that now and then judges of the highest rank utter *dicta* hastily.

§ 92. The Justification for Quasi-Authority.

To give to *dicta* and to non-judicial utterances the force of precedent would be to recognize that law can be established otherwise than by actual litigation or by statute. This would be inconceivable under the accepted theory of the function of judges.² Nevertheless, to give no weight at all to *dicta* and to non-judicial utterances of learned men would be to ignore aids that to any non-judicial person would seem well worth investigation. Any lawyer in search of a solution for an intricate problem is glad to know what view, however hasty, is taken by any other person learned in the law; and when the lawyer goes upon the bench he does not lose his spirit of inquiry.

¹ See §§ 13, 14, 55, 59.

² See §§ 5-14.

§ 93. *Stare Decisis*.

The principle requiring courts to follow decisions of imperative authority is termed *stare decisis*.¹ The principle is most stringently applied in instances where the old decisions have established a rule as to property.

¹ See § 53.

"It will be of dangerous consequence to alter resolutions in these cases. It is removing the ancient landmarks." *Per* Lord Parker, C. J., *Goodright v. Wright*, 1 Str. 25, 32 (1716-7).

"Though Gerrard and Gerrard and Greaves and Maddison were strong cases, yet this case seems to go yet farther; and as Lord Chancellor Cowper . . . declared . . . he would not have gone so far, I for my part declare, I'll not go a jot farther; but where things are settled, and rendered certain, it will not be so material how, as long as they are so, and that all people know how to act." *Per* Lord Parker, C., *Butler v. Duncomb*, 1 P. Wms. 448, 452 (1718). In *Farrington v. Knightly*, 1 P. Wms. 544, 549 (1719), the same judge said: "It is highly proper the law should be settled one way or other in this case, though no great matter which way, so it be but known."

In *Dawes v. Ferrers*, 2 P. Wms. 1, 2 (1722), Lord Macclesfield, C., "interrupted the plaintiff's counsel, saying, that he would not suffer the bar to dispute what was the foundation and landmark of the law; and though what was contended for might be reasonable, if it were to be then first adjudged, yet, whatever the law was, provided it were certain and known, it would be well for the subject, though in some particular instances it might seem unreasonable." In *Rutland v. Rutland*, 2 P. Wms. 209, 213 (1723), the same judge said: "It is very necessary that the rule of property should be known, fixed, and certain, that people may know which way to steer."

In *Chandos v. Talbot*, 2 Str. 601, 613 (1731), Lord King, C., said: "This being the rule which has of late universally prevailed, . . . it would be of the most dangerous consequence, and disturb a great deal of property, for him to break into it."

In *Rayner v. Mowbray*, 3 Bro. C. C. 234, 235 (1791), where the question was as to the construction of the word *relations* in a will, Lord Thurlow, C., said: "If it was a recent matter, there might be a doubt. . . . When once a rule has been laid down, it is best to abide by it. We cannot always be speculating what would have been the best decision in the first instance."

§ 94. The Power to Overrule.

Yet a court has the power to overrule its own decision ; and when the decision is shown to be ill-considered, opposed to the analogies of the law, and unjust, the power becomes a duty,¹ subject to the important qualification that courts must

¹ "It is going quite too far to say that a single decision of any court is absolutely conclusive as a precedent. It is an elementary principle, that an erroneous decision is not bad law ; it is no law at all. It may be final upon the parties before the court, but it does not conclude other parties having rights depending upon the same question." *Per* Bronson, J., in *Butler v. Van Wyck*, 1 Hill (N. Y.), 438, 462-463 (1841).

"Where a rule of property is erroneously settled, courts will rarely, if ever, depart from the decision, because such a departure will disturb rights acquired under the sanction of the rule ; nor will they determine that to be criminal which has been decided, though erroneously, to be innocent. The reason of these rules has obviously no application, when the decision sought to be corrected is one which disappoints the expectation of the parties to an act, and renders void their contracts. There can have been no dealing between parties on the faith of any such rule. To alter such a decision does not disturb property nor interfere with any vested rights which the law is to regard ; on the contrary, that course gives effect to the intentions of parties and removes an obstacle which ought not to have been interposed in their way.

"A decision of the character of that in question stands therefore upon the general doctrine of *stare decisis*, unstrengthened by any peculiar considerations founded on the nature of the decision or the unjust consequences which might follow from its alteration. That maxim, though entitled to great weight, does not furnish an absolute rule which may never be departed from. That it does not, the number of overruled decisions, which have accumulated in the administration of the common law, abundantly proves. To depart from a decision is undoubtedly an act by which a court incurs a high degree of responsibility ; and it should certainly be satisfied that its course is such that the future judgment of the enlightened profession of the law will approve its determination. But when it is satisfied that an erroneous determination has been made, and that too, without a full consideration of the merits of the question decided ; when it sees that to correct it will render void no one's honest acts, nor disappoint any just

use excessive care not to disturb unnecessarily the established rules of property.

§ 95. The Conflict.

It is obvious that between the principle *stare decisis* and the principle permitting a court to overrule its decisions there is a conflict. Unfortunately the courts attempt to conceal this conflict, although they state each of the principles in emphatic language and follow now one of them and now the other.¹ The principle more usually followed is *stare decisis* ;

expectation ; when, in short, it is fully persuaded that there is no one reason why such a decision should again be made, except that it was once made before, then I think a court would be sacrificing substance to shadow if it refused to correct its error. Nor do I believe that by so doing a court would disturb public confidence in the stability of its judgments. Courts are not inclined, any more than men out of courts, to admit that they have erred ; and where the administration of justice is public and must proceed upon reasons assigned for every judgment, there is little danger from the exercise, under the responsibilities which necessarily attach to its exercise, of the power which a court possesses to retrace its steps when it is satisfied that an error has been committed." *Per* Johnson, C. J., in *Leavitt v. Blatchford*, 17 N. Y. 521, 543-544 (1858).

¹ In 1863 Lord Westbury thus addressed the House of Lords : —

"I will describe the exact value, authority, and weight which reported decisions — that is to say, precedents — have by the rules of English law, and the manner in which their authority is sometimes admitted to almost an extravagant extent, and at other times denied in courts of justice. . . . Lord Coke says, 'Our book cases are the best proofs of what the law is.' Chief Justice Best says, 'The judgments of the Courts of Westminster-hall are the only authority that we have for by far the greater part of the law of England.' Chief Justice Tindal . . . said, 'Decisions of the Courts of common law are at once the best expositors and the surest evidence of the common law itself.' The doctrine of Mr. Justice Blackstone is that precedents and rules must be followed unless they are flatly absurd and unjust. An ornament of your lordships' House, . . . Lord Wensleydale, says, 'In our system of judicature we are bound by precedents, and by the authority of previous cases unless they are plainly and manifestly founded on erroneous principles.'

and the courts usually pretend to follow this principle even when they are going in precisely the opposite direction.¹

“ . . . Observe the enormous amount of uncertainty which is contained in these enunciations of the mode of ascertaining the law, particularly when it depends upon a rule being extracted from a number of varying and discordant cases. . . . Each succeeding judge has it in his power to determine what is absurd, what is unjust, what is the measure of erroneous principle. Nor is this the only evil inherent in the present system, for there is another necessarily inherent also, and it is this — in the language of Lord Bacon — that the unlearned age governs the more learned, because you take your rule as it is laid down in an early and undeveloped stage of society, and you are compelled to abide by that rule, if, for instance, it has regulated the disposition of property, until the Legislature intervenes to rescue the law from the necessity of following what is often unreasonable and absurd. But the contradiction and anomaly do not end there; as I will render plain to your Lordships by citing one or two instances of the manner in which decided cases are occasionally dealt with by courts of justice. . . . The Court of Queen’s Bench, in 1801, when it was constituted of judges of great reputation, speaking of a single case which had been decided by the same Court *only three years before*, disapproved it, and yet considered the case before them as concluded by its authority, and that, the matter having passed *in rem judicatam*, the merits could not now be entered into. On another occasion Lord Ellenborough said, ‘With a decided case exactly in point, it would be extraordinary if we were to apply a different rule of construction, although, if it were to be decided now for the first time, I should not now think that decision right.’ In many instances the language is, ‘It is better *stare decisis*; the very case has already been determined.’ Lord Eldon says, ‘Where there is a decision precisely in point it is better to follow it.’ In a multitude of cases the authority of a single case, though not fully approved, has governed judicial decisions. The language used is, ‘Although if the matter were *res integra* it might admit of difficulty;’ or ‘although the doctrine is not founded on good sense,’ or ‘not bottomed in reason,’ or ‘although the Court cannot approve or cannot understand the reasons,’ yet the authority of the case must be followed; and Courts ought no longer to reason on the rule but adhere to it. On the other hand, a single case is frequently overruled, although it is declared that ‘no case can be entitled to more respect,’ or, that it is a case to which ‘the Court looks with great

¹ See §§ 53, 66.

§ 96. *The Result.*

If *stare decisis* were the only principle, the law, at least as to matters heretofore litigated within the jurisdiction, would be certain and stable. If, on the contrary, there were no principle *stare decisis*, every piece of litigation would be decided precisely as seems most just in the eyes of the court trying the case, previous decisions being treated as mere aids and not as dictators. The system recognizing *stare decisis* has its obvious advantages; and so has the contrary system. What shall we say of the system that contains both *stare decisis* and the power to overrule? We must not hastily infer that the composite system combines the advantages of the two. It would be as reasonable to infer without examination that it combines the disadvantages.¹ Only by carefully examining the results of the conflicting play of the two forces can one be prepared to say that the combination has been for good or for evil. The fact seems to be that, by reason of the conservative prejudices of judges and by reason of the strict watch maintained by the bar, the power to overrule decisions has seldom been made a means of suddenly unsettling the law, but has been used simply as a slow method of bringing old principles into harmony with modern ideas. In other words, we live under a system of *stare decisis*, tempered slightly by a power to overrule. Thus we receive almost all the good effects of *stare decisis*, and almost all the bad effects also; and we receive few of the bad effects of an unstable system and few of the good effects.

respect,' or, that it is 'a deliberate judgment,' or, because 'the Court cannot conceive the principles upon which the decision is founded.' Sometimes the Court says of a decided case that it stands altogether by itself, and sometimes the antecedent decision is tossed aside in a rude manner, as where Lord Ellenborough says, 'The case referred to has had its day, and it is time it should cease.'" The Lord Chancellor's Speech on the Revision of the Law (Macqueen's ed.), 9-13.

¹ As is shown in Bentham's criticism on Blackstone's eulogy of the British government. 1 Bentham's Works (Bowring's ed.), 282.

§ 97. *Utility of Classifying the Kinds of Authority.*

As a court attaches some weight to any of the matters herein described as of imperative authority or of persuasive authority or of *quasi*-authority, and as a court has it in its power to disregard even imperative authority, the question naturally arises whether the attempted distinctions between the kinds of authority are not wholly imaginary, or at least unimportant. The answer is that the distinctions are substantial and are constantly kept in mind by counsel and court.¹ True it is that these several kinds of authority are not in practice distinguished by the names herein given to them, nor by any names; but though each of the kinds of authority is called by the one name, — simply authority, — every lawyer knows that as to authoritativeness a decision of the very court or of a court of superior jurisdiction differs not only in degree but in kind from a decision of some other court, and that a decision of any court, however humble or remote, differs not only in degree but in kind from a *dictum* or a statement in a text-book; and the court, though listening to *dicta* and to statements in text-books, listens with very different attention when decisions are cited, no matter whence those decisions come, and listens to its own decisions and to the decisions of its appellate tribunal with still another attitude of mind. Thus there is the strongest practical reason for distinguishing the several kinds of authority. Further, the distinction is valuable for purposes of legal discussion: for example, when it is said, as it often is, that by reason of the great number of courts of last resort in the United States the weight of precedents is becoming less than formerly, what is meant is not that imperative authority is not recognized as heretofore, — in other words, not that the doctrine *stare decisis* is weakened, but simply that persuasive authority, being often conflicting, is less regarded than heretofore and elsewhere.

¹ See § 74.

CHAPTER X.

REPORTS.

§ 98. **The earliest Reports.**

The perception of the necessity and purpose of reports was of slow growth. There are in existence memorials of litigation antedating the Norman conquest by more than three hundred years, but these early accounts were not prepared for the purpose of furnishing precedents, for in fact they are usually passages in monastic chronicles or in other non-professional records.¹ Beginning with the reign of Richard I., there are official records of litigation ; but these Court Rolls, although they sometimes gave brief indications of the court's reasoning, had for their special purpose the preservation of the results of the very litigation as fixing the rights of the parties, and were not well adapted for use as precedents.² The earliest memorials that were intended primarily as store-houses of precedents were, so far as is now known, the Year Books, beginning about the middle of Edward I.'s reign, and continuing, with some breaks, until the latter part

¹ The early accounts of litigation which are most interesting to lawyers are collected in *Essays in Anglo-Saxon Law*, by Henry Adams and others, appendix, 309-379, covering the years 734-1077, and in Bigelow's *Placita Anglo-Normannica*, covering the years 1066-1195. See Coke's caution, quoted *supra*, § 38, n.

² See the preface to 1 Douglas, quoted *supra*, § 15, n.

"Of ancient time in judgments at the common law, in cases of difficulties either criminal or civil, the reasons and causes of the judgment were set down in the record, and so it continued in the reigns of E. 1, and most part of E. 2, and then there was on need of reports."
4 Co. Inst. 4.

of Henry VIII.'s reign.¹ The Year Books are the work of skilled lawyers; and the reports of cases, when complete,

¹ "Of the Common Law, much, no doubt, consisted originally of customs and usages, recorded only in the memories of men; much, of rules embodied in acts of the Great Council, of which no record now exists; much was derived from the civil law, relics of the old Roman jurisprudence, which remained so long throughout the land; and much was deduced from general maxims and principles handed down from one generation of lawyers to another. Thus the sources of the Common Law were in ancient times of the most indefinite character, and the power or liberty of judicial decision was equally unlimited. In the old time it was impossible to know what the law was until it was declared. The judges were not only legislators, but the worst of legislators, — legislators *ex post facto*.

"Consequently, at an early period, it was deemed necessary, for the protection of liberty, and in order to get some kind of approach to uniformity, constancy, and regularity in the law, that the grounds and reasons of the judges' decisions should be given. At first an attempt was made to do so by entering the reasons for the judgments in the rolls of the court; and our Court-Rolls, preserved from the time of Richard I., contain repeatedly the reasons for the decisions and sentences. In the reign of Edward I., the practice of reporting the decisions of the judges began, and from that period we have a series of judicial reports of those decisions. That was a great security, because it was an approach to certainty in the law. It introduced the practice of appealing to former decisions as authority for the determination of similar cases, and thus originated that distinctive peculiarity of the English mind, — the love of precedent, a love of appealing to the authority of past examples rather than of indulging in abstract reasoning. This was the only mode in which the Common Law was recorded, and the only mode in which it became known. These reports were kept for a considerable period of time under the superintendence of the judges themselves, and great care was taken in sifting and ascertaining the proper grounds of decision. The evil was, therefore, comparatively little; but in course of time, as the reports multiplied and as the personal superintendence and care of the judges were withdrawn, there being no provision for revising and digesting the reports from time to time, great complaints began to arise; and so much inconvenience was felt, that as early as the time of Lord Bacon, it became a subject of general dissatisfaction, and led to his publishing his celebrated proposal for the compil-

present an adequate view of the pleadings, which until the middle of Edward III.'s reign were oral,¹ and of the rapid and pointed discussions in which counsel and judges and *amici curiae* took part, and of the final result.² Contempo-

ing and amendment of the law of England. . . . Lord Bacon himself says :—

“The Common Law of England is no text law, but the substance of it consisteth in the series and succession of judicial acts, which from time to time have been set down in the reports, so that as these reports are more or less perfect, the law itself is more or less certain, and indeed better or worse, whereupon a conclusion may be made, that it is hardly possible to confer upon this kingdom a greater benefit than that these books should be purged and revised, whereby they may be reduced to fewer volumes and clearer resolutions.”

“In the time of Lord Bacon these reports extended to, at the utmost, fifty or sixty volumes. During the 250 years that have passed since then, nothing has been done in the way of revision or expurgation ; but these fifty or sixty volumes have grown to between 1100 and 1200 volumes. Nay, more, at this time there are at least forty or fifty distinct sets of reports pouring their streams into the immense reservoir of law, and creating what can hardly be described, but may be denominated a great chaos of judicial legislation. . . .

“The reports are published without any judicial control or sanction, nor is there any provision to secure correctness or security against error, but as soon as a report is published of any case with the name of a barrister annexed to it the report is accredited, and may be cited as an authority before any tribunal.” The Lord Chancellor's (Lord Westbury's) Speech on the Revision of the Law, Macqueen's ed. 5-9.

¹ Y. B. 30 & 31 Ed. I., (Horwood's ed.) preface, xxviii. ; Stephen on Pleading, appendix, notes 5 and 6.

² Coke said of the Year Books : “How carefully have those of our profession in former times reported to ages succeeding, the opinions, censures, and judgments of their reverend Judges and sages of the common laws : which if they had silenced and not set forth in writing, certainly as their bodies in the bowels of the earth are long ago consumed, so had their grave opinions, censures, and judgments been with them long since wasted and worn away with the worm of oblivion.” Preface to 1 Co., xxvi. Of his own reports, he said : “To the Reader my advice is, that in reading of these or any new Reports, he neglect not in any case the reading of the old books of

aneous with the later Year Books were other reports ; and since the reign of Henry VIII. there has been no lack of precedents. Some of the early reports are not of high authority,¹ but others are esteemed to this day. Indeed, in view of the ideas as to reports expressed by Plowden² and

years reported in former ages, for assuredly out of the old fields must spring and grow the new corn." 1 Co., preface, xxx.

"The kings of this realm, that is to say, E. 3, H. 4, H. 5, H. 6, E. 4, R. 3, and H. 7, did select and appoint four discreet and learned professors of law to report the judgments and opinions of the reverend judges, as well for resolving of such doubts and questions wherein there was (as in all other arts and sciences there often falls out) diversity of opinions, as so for the true and genuine sense and construction of such statutes and acts of Parliament as were from time to time made and enacted. To the end that all the judges and justices in all the several parts of the realm might, as it were with one mouth in all men's cases, pronounce one and the same sentence." 3 Co., preface, iii-iv. See also Plowden, preface, iv, and 1 Douglas, preface, vi.

¹ See § 39.

² Writing in 1578, Plowden said :—

"In this work, and especially at the latter part thereof . . . I have for the most part reported cases in a summary way, collecting together the substance (as it appeared to me) of all that was said on the one side, and on the other, and oftentimes of all that was said by the judges themselves, without reciting their arguments *verbatim*. In which case I have purposely omitted much that was said both at the bar and at the bench, for I thought that there were few arguments so pure as not to have some refuse in them, and therefore I thought it best to extract the pure only, and to leave the refuse, then and yet holding that to be the best method of reporting. But this is a task not easily accomplished, for he who would reject a great part of what was spoken as vain and superfluous, and relate only that which was pure and material, ought to have not only great understanding and memory, but especially an excellent and distinguishing judgment, for otherwise he may reject as ineffectual that which is very material, and approve as effectual that which is of no weight, whereby he would do an injury to those at the bar and at the bench who argued, and would give them just cause of offence, and also by such means the subject-matter itself would be much injured. . . .

by Bacon,¹ and in view of the many cases excellently reported by Dyer, Plowden, Coke, Croke, Yelverton, Hobart, and

“And (in my humble apprehension) these reports excel any former book of reports in point of credit and authority, for other reports generally consist of the sudden sayings of the judges upon motions by the serjeants and counsellors at the bar, whereas all the cases here reported are upon points of law tried and debated upon demurrers or special verdicts, copies whereof were delivered to the judges, who studied and considered them, and for the most part argued in them, and after great and mature deliberation gave judgment thereupon, so that (in my opinion) these reports carry with them the greatest credit and assurance.

“And in order that I might execute this work with the utmost sincerity and truth, and to the intent that I might be more able to understand the arguments, and to comprehend the true causes of the judgments herein contained, let me inform the reader, that in almost all the cases which I have undertaken to report, before they came to be argued I had copies of the records, and took pains to study the points of law arising thereupon, so that oftentimes I was so much master of them, that if I had been put to it, I was ready to have argued when the first man began; and by this method I was more prepared to understand and retain the arguments and the causes of the judgments. And besides this, after I had drawn out my report at large, and before I had entered it into my book, I showed such cases and arguments as seemed to me to be the most difficult, and to require the greatest memory, to some of the judges or serjeants who argued in them, in order to have their opinion of the sincerity and truth of the report, which being perused and approved by them I then entered it into my book. . . .

“And as to these summary reports, although I have omitted many things which were said, as being deemed by me less material than that which is here reported, yet I have not thereby (as far as I am capable of judging) given just cause of offence to any. For neither in them nor in the others have I suppressed any sentence which I remembered and thought to be very material, but I have expressed the matter intended truly, and for the most part in the words of the party who spoke it, sometimes indeed in other words added by myself,

¹ These are Bacon's views, “Of the Reporting of Judgments:”—

“Above all things, let the Judgments delivered in the Supreme and Principal Courts on important cases, especially if they be doubtful and

Saunders, it must be admitted that long before the Revolution of 1688 the theory and practice of reporting had reached a high mark. Yet those early reports, though accurate and still in high repute, do not carefully follow a scheme of condensation and orderly arrangement, but too often perplex the reader by unnecessary details and by failing to separate clearly the statement of the case, the arguments of counsel, and the opinions of the judges. The first reporter to make orderly and condensed reports in full harmony with modern ideals was Sir James Burrow, who reported decisions of the Court of King's Bench from 1756 to 1772.¹

showing the matter more fully, but never (to the best of my knowledge) departing from the sense or intent of the party touching the matter ; which liberty (I think) I and all other reporters of our law may take, and especially in all summary reports." Plowden, preface, iv, vi-viii.

To the same effect is 10 Co., preface, xx.

contain some difficulty or novelty, be diligently and accurately taken down. For judgments are the anchors of laws, as laws are of the state.

"Let this be the method of taking down judgments and committing them to writing. Record the cases precisely, the judgments themselves word for word; add the reasons which the judges allege for their judgments; do not mix up the authority of cases brought forward as examples with the principal case; and omit the perorations of counsel, unless they contain something very remarkable.

"Let the reporters be taken from the most learned counsel, and receive a liberal salary from the state. But let not the judges themselves meddle with the reports; lest from being too fond of their own opinions, and relying on their own authority, they exceed the province of a reporter.

"Let these judgments be digested in chronological order, and not by method and titles. For such writings are a kind of history or narrative of the laws. And not only the acts themselves, but the times also when they passed, give light to a wise judge." Bacon, *De Augmentis Scientiarum*, lib. viii., cap. iii., aphorisms 73-76, as translated in Spedding, Ellis, and Heath's edition of Bacon's works, vol. v. pp. 103-104. For the original Latin text, see the same edition, vol. i. p. 821.

¹ 1 Burr., preface; Wallace's Reporters, (4th ed.) 446.

§ 99. The Reporter's Aim.

The purpose of a volume of reports is to aid the public, and especially lawyers and judges, by presenting in a useful form valuable precedents.¹ From this general purpose flows

¹ See § 1.

"The object of a report is, not to inform the public of all that passes in a court of justice, but to preserve a record of what is decided to be law; and the object of having this record is to facilitate the study of the law itself." Lord Justice Lindley, in Daniel's History of the Law Reports, 63.

"A Report of a judicial decision may be likened to a Portrait; it is, or ought to be, a truthful representation of a matter of fact. There may, no doubt, be different degrees of skill exhibited in the preparation of the picture; it is not, however, a work of imagination. A Report affords no scope for displaying the arts of rhetoric, it ought to be a condensed but correct statement, *so far as necessary to elucidate the point decided*, of the issues of fact and law, the material allegations necessary to raise the one and the other, the arguments on each side, and the grounds and reasons of the judgment. . . .

"The next characteristic of a Report is Accuracy, by which I don't mean ideal, absolute accuracy, nor that degree of accuracy which would not admit of shades of difference. I don't mean the accuracy of a photograph — we are not in search of abstract perfection — I mean that degree of accuracy which satisfies the judgment of a skilled and experienced mind especially charged with the duty of determining what is sufficient. Upon this question of accuracy the parallel between Acts of Parliament and Reports ceases to apply. In the case of Acts of Parliament, accuracy is obtained by what may be termed mechanical correctness, — the ordinary care of the copyist and compositor, checked by examination. To obtain the accuracy essential to a report, we must resort to means more exposed to the chances of error, — we require a combination of skill, learning, and experience specially qualified for and directed to the labor of its preparation." Daniel's History of the Law Reports, 32.

"The desired report consists neither in the facts nor in the decree, but in the relation of the one to the other, which relation is a mental phenomenon, capable of being externally manifested in its integrity by the judge in whose mind it occurs, but at which no other man can do more than guess." J. Westlake, "Legal Reporting," 2 Juridical Society Papers, 745, 750 (1863).

the solution of the various problems presented to the reporter. These problems deal with every step, beginning with the selection of the cases to be reported and ending with the preparation of the index and the tables. This chapter is devoted principally to a discussion of a few matters as to which the practices of modern reporters differ from one another or from the practices of their predecessors.

§ 100. **The Selection of Cases.**

Many cases are unworthy of a place in the reports.¹ The test of the value of a case is the question whether it will aid a person learned in the law to deal satisfactorily with later litigation. If the case simply applies in a common or obvious way an unquestioned rule of law, to report it is not to render aid to the profession. It is usually unprofitable to report cases in which the question is whether the facts show fraud or negligence; for the requisites of fraud and of negligence are well known, and the facts are so numerous and so closely interwoven that each case must remain unique. Still more clearly, it is useless to report cases in which the question is as to the weight of conflicting evidence. Again,

¹ In selecting cases it has often been the reporter's plan to omit, cases deemed by him to have been decided incorrectly.

"Harcourt seems to have given mortal offence to Vernon, the reporter, who practised as a counsel regularly before him, but spitefully suppresses his best decisions, and gives doubtful ones. See 2 Vernon, 664-688. I suspect that the reporter may have been a Whig, and copied the Tory blacksmith, who in shoeing the horse of a Whig, always lamed him. When I was a *nisi prius* reporter I had a drawer marked 'Bad Law,' into which I threw all the cases which seemed to me improperly ruled. I was flattered to hear Sir James Mansfield, C. J., say, 'Whoever reads Campbell's reports must be astonished to find how uniformly Lord Ellenborough's decisions were right.' My rejected cases, which I had kept as a curiosity — not maliciously — were all burnt in the great fire in the Temple when I was Attorney General." 5 Campbell's Lives of the Chancellors, (4th ed.) 376 n. (p.).

the construction of written words, though it is a question for the court and not for the jury, depends largely upon the context and the circumstances ; and hence a case of verbal construction is of little value as a precedent.¹

¹ "A 'reportable case' is one that will be useful to the practitioner, one that construes a somewhat ambiguous Act of Parliament of general interest, that lays down some fresh legal principle or applies a well-known principle of law to entirely different circumstances, that doubts, or, as it is frequently termed by the more polite reporters, distinguishes a previous reported case ; cases in short that add something to our legal knowledge. 'Unreportable' cases will therefore include the following examples : those turning on the special wording of a particular document that is generally subject to considerable variation, for in such cases, as many past and present members of the Bench have remarked, decisions on similar words in other documents are of little or no value ; many decisions on the construction of Wills and Settlements should therefore be excluded, as well as those on contracts or other documents, the construction of which depends on their special terms. An exception to this class must however be made, namely, with regard to cases on the construction of Bills of Lading and Charter-parties, for these documents have reached a fairly general form, and even if the form be not always similar, large shipping companies have general forms that govern the rights of a large number of persons ; decisions on such documents are therefore useful to the practitioner. Let us take another example : cases that depend on the discretion of the court are nearly always useless, because judicial discretion is exercised after taking into consideration all the facts of the particular case ; reporters try hard to fetter the exercise of a judge's discretion, but do not succeed ; a judge may be said to have followed a previous decision, because he exercises his discretion in the same way as another judge had previously done, but there is no rule binding a court as to the exercise of its discretion.

... Again, cases turning upon the doctrine of Waiver, Acquiescence or Laches are for the most part useless ; the rules governing these subjects are well defined ; the only question that arises is not one of principle, but whether in each particular case these grounds of defence are an answer to the action. A further instance occurs in cases where the point to be decided is whether a covenant in restraint of trade is unreasonable and therefore not capable of being enforced, no principle is stated by the Bench, but upon the special wording and

In former times it was customary for reporters to select the cases they deemed important ; but the growing practice, now almost universal throughout the United States, is to print all the cases decided in courts of last resort, although lawyers recognize that courts of last resort often are compelled to pass upon cases involving no important question of law.¹

§ 101. The Titles of Cases.

In many jurisdictions the title of a case taken to an appellate court assumes a form different from the title of the case in the court below. If the case began as *X v. Y*, in the appellate court it will be known as *Y*, plaintiff in error (or appellant), *v. X*, defendant in error (or appellee), or *vice versa* ; and if the case is carried to a still higher court another similar change occurs. To take an actual example, the case of *Kent v. Baltimore & Ohio Railroad* begun in the Common Pleas Court of Knox County, Ohio, became, in the Circuit Court, *Baltimore & Ohio Railroad Co. v. Kent*,² and became, in the Supreme Court, *Kent v. Baltimore & Ohio Railroad*.³ Obviously it is only by carefully pointing out the successive transpositions of parties that the reporter can prevent the reader of the case in the highest court from

special facts the validity of that particular covenant is determined. Reporters would do as much good to the profession by reporting a case at nisi prius, setting out the facts and contentions of the opposing counsel and the verdict of the jury." John Mews, "The Present System of Law Reporting," 9 *Law Q. Rev.* 179-181 (1893).

As to the selection of cases the views expressed by Mr. Mews are harmonious with those expressed by Lord Justice Lindley, "The History of the Law Reports," 1 *Law Q. Rev.* 137, 143-144 (1885).

¹ "To say the truth, many questions are raised rather out of the weight of the matter than the difficulty of the case : for I never saw any case of great value proceed quietly without many exceptions in arrest of judgment." 10 *Co.*, preface, xxi.

² *Baltimore & Ohio Railroad Co. v. Kent*, 1 *Ohio C. C.* 81 (1885).

³ *Kent v. Railroad Co.*, 45 *Ohio St.* 284 (1887).

becoming perplexed. Some courts and reporters retain the original title to the last, indicating, however, which party has brought the case to the several courts; and this seems the preferable practice.¹

§ 102. The Head-Notes.

In the excellence of the head-notes reports vary vastly. Most head-notes are a substantial aid to the lawyer, especially if he treats them as simply *prima facie* correct indicators of the topics treated. The aim of the reporter, however, is not simply to give aid but also to give aid in the briefest and most efficient way. As has already been pointed out, it seems impracticable to frame all head-notes upon one plan.² It is the reporter's duty to determine by his own study the proposition of law involved in the case, and not simply to extract from the opinion a few apparently pertinent sentences.³ His duty is also to indicate in the head-note what statutes have been construed and what cases have been discredited and what important *dicta* have been uttered,⁴ the *dicta* being carefully distinguished from the doctrine of the case.

§ 103. The Statements.

The statement of the case is intended to enable the reader to ascertain quickly and clearly what problem was presented to the court and by what procedure the problem was presented. Long quotations from the pleadings or from the

¹ Editorial note, 26 Am. L. Rev. 914 (1892).

² See §§ 27-33.

³ In jurisdictions where by statute or by rule of court the judges are required to prepare the head-notes, the judges, as far as this duty goes, are really reporters.

⁴ "A *semble* is clearly a proper subject of a head-note, but a query is in almost every instance useless, for in such cases the court offers no opinion; if an opinion is offered, that *dictum* would be a *semble*." John Mews, "The Present System of Law Reporting," 9 Law Q. Rev. 179, 182-183 (1893).

evidence are usually unnecessary, and indeed a source of perplexity. What is wanted is condensation. Some of the old reports often give the pleadings in full, but that is for the purpose of presenting to lawyers useful collections of forms ;¹ and for the purpose of indicating the point of law raised, the same reporters usually prefix to the same cases condensed statements.

The statement now usually prepared by one of the judges as an introduction to the opinion diminishes the reporter's task very materially, enabling him now and then to omit any statement of his own ; but of course the reporter is responsible for the presentation of a suitable statement, and hence the careful reporter does not assume without investigation that the judge's statement is accurate, nor that it is adapted to the purposes of a report. No doubt it is seldom useful to have two statements ; but if one is to be omitted, the one to be printed is one made by the reporter.

§ 104. The Arguments.

Formerly it was customary to report in a condensed form the arguments of counsel. This is still the English custom. In most of the United States the tendency now is to omit the arguments entirely.

When cases are numerous and opinions and arguments are long, there certainly is a temptation to omit arguments ; but it seems clear that an epitome of the arguments is an important part of a complete report, both because the arguments show what points were in the mind of the court,² and because they often contain a vast amount of learning, the fruit of many years of study upon the points involved.³

¹ Examples are Plowden, Coke, Saunders, Lord Raymond, Sal-keld. See Plowden, preface, v-vi.

² See § 42.

³ In commenting upon an Iowa statute making it the duty of the reporter to furnish for publication, "in all cases where he may deem

§ 105. **The Opinions.**

As the only purpose of a report is to indicate what problems were presented to the court and what principles were adopted as affording a solution, the importance of the opinions is obvious.¹

§ 106. **The Opinions, continued: Majority Opinions.**

Until comparatively recent times opinions were delivered by each judge and were oral. Such opinions were brief, and the notes of them made by reporters were still briefer. In consequence the opinions in the early reports are usually characterized by brevity and pithiness.² The modern reporter who

it of sufficient importance, the legal propositions made by counsel in the argument, with authorities cited," the reporter of the Supreme Court of Iowa, N. B. Raymond, says: "The value of an opinion by any court, involving the determination of new questions, must, of necessity, depend in a measure upon the ability and learning shown in the arguments of counsel. If a question be determined by the court contrary to the opinions of respectable authorities, and it appears that the attention of the court was not called to such authorities, nor to the propositions upon which their conclusions are based, it may reasonably be presumed that the court with such additional light might have reached a different conclusion, and may be persuaded to change its position upon a subsequent presentation of the question. The converse of this proposition is also true. . . . That the bar may be furnished the information upon which to base its judgment of an opinion, and that it may have the benefit of the briefs of counsel where they are of peculiar value, is believed to be the purpose of the above provision. In this view it is not simply the arguments which show the greatest learning that ought to be published. The very fact that an argument is so deficient in the proper presentation of a cause as to afford little assistance to the court in its determination may be the best of reasons for its publication." Preface, 81 Iowa, v-vi.

¹ See §§ 13-21.

² Obvious difficulties are encountered by the reporter who attempts to report oral opinions. Sir James Burrow said:—

"I do not take my notes in short-hand. I do not always take down the *restrictions* with which the speaker may *qualify* a proposition, to guard against its being understood universally or in too large a sense. And therefore I caution the reader, always to *imply* the exceptions

attempts to imitate these good qualities finds serious difficulties. In most American courts opinions are now prepared in writing. Written opinions are usually longer than oral ones; and to cut away parts of written opinions is embarrassing to the reporter. Further, the reporter's duties have been rendered still more perplexing by the comparatively new custom, now prevalent throughout almost all the United States, of assigning to one judge the preparation of an elaborate opinion for the whole court, or for the majority. The opinion thus prepared is usually long; and it largely owes its form and length not to a belief that a report should contain such an elaborate opinion, but rather to a very substantial necessity arising out of the method by which many courts now arrive at their conclusions. This method, widely prevailing but not yet adopted universally, is substantially as follows. The judges listen to the oral arguments, if any, and read the printed briefs and arguments. Shortly afterwards they meet in consultation and exchange views. The result of the consequent discussion is usually a preliminary agreement upon the decision. Thus far, however, few authorities have been examined, but the court has been guided almost exclusively by the general knowledge of its members and by the arguments of counsel. In order that no mistake may

which ought to be made, when I report such propositions as falling from the judges. I watch the *sense*, rather than the *words*; and therefore may often use some of my own. If I chance not fully to understand the subject, I can then only attend to the *words*; and must in *such* cases, be liable to mistakes. If I do not happen to know the authorities shortly alluded to, I must be at a loss to comprehend (so as to take down with accuracy and precision) the *use* made of them. Unavoidable inattention and interruptions must occasion chasms, want of connection, and confusion in many parts: which must be patched up and connected by memory, guess, or invention; or those passages totally struck out." 1 Burr., preface, vi.

Nevertheless, Burrow's Reports are of the very highest rank. Wallace's Reporters (4th ed.), 446. See § 98.

occur, a judge, usually a judge deemed peculiarly qualified to examine such a question as the one involved in the very case, is appointed to make a searching examination of the case and of the authorities, and to report the result to his colleagues. Using the briefs as a guide, and using also all other guides at his disposal, he examines all authorities, makes notes of them, and prepares an opinion. Obviously the immediate purpose of this opinion is to inform the court fully as to the previous course of decision, and to convince the court as to the proper disposition of the case at bar. Consequently the opinion is likely to contain an uncondensed exposition of the author's reasoning and an elaborate statement of most of the important authorities, with quotations. In short, such an opinion differs little from an argument, save that it admits candidly the force of adverse authorities. The judge submits this opinion to his colleagues; and, after discussion and amendment, it usually is adopted as the opinion of the court, and, uncondensed, is read in public. Thereupon the reporter usually prints the whole of it, fearing that otherwise he might seem disrespectful. Yet it is obvious that, if the author of the opinion had looked upon it not as an argument but as a contribution to a permanent report, he invariably would have condensed the reasoning; and he usually would have cited precedents without full statement, for the judge knows that his statement of precedents is not authoritative and that it does not materially relieve the subsequent investigator. No one knows better than the judges that an ideal report of a case contains not a verbose opinion but a condensed opinion showing as briefly as possible precisely what was the court's reasoning. To make such an abridgment is, however, not the office of the judges, but the office of the reporter; and, as has been suggested, there are obvious embarrassments attending this part of a reporter's duty.¹

¹ See Bacon's views, quoted in § 98, n.

§ 107. The Opinions, continued : Dissenting Opinions.

It is sometimes said that dissenting opinions should not be reported, the reasons assigned being that they do not give the doctrine of the case and that they tend to prevent the law from becoming settled. Yet there are weightier reasons on the other side. The investigator is entitled to know that there was a divided court. It is important to know whether the dissent was as to the general doctrine or simply as to the application of the doctrine to the particular case. Finally, as law, especially case law, is not arbitrary but is based upon reason, and can and must be brought eventually into harmony with the requirements of reason, it is important to know what can be said by the strongest opponent of the doctrine applied by the court. Hence it seems advisable to indicate, briefly but accurately, the reasoning and citations contained in a dissenting opinion.¹

§ 108. The Judgments, or other Results of the Litigation.

In the Year Books the reports are often incomplete, not stating what was the result of the litigation. Apparently those reports are composed of memoranda taken from day to day, as the case progressed ; and thus by reason of settlement out of court, or by reason of a failure of the reporter to attend the final sitting, or in some other manner, the reporter's memoranda might end in the midst of the case. Now and then, later volumes of reports contain similarly incomplete accounts ; but almost invariably the reporter places at the end of the case a statement clearly indicating what was done by the court. Occasionally, especially in equity cases, the reporter gives a verbatim copy of the final entry ; but usually a brief memorandum, containing two or three words, answers the purpose perfectly.

¹ Editorial note in 27 Am. L. Rev. 87 (1893). And see § 47.

§ 109. **Official Reports.**

Governments are considered to owe to their citizens the duty of publishing the statute law. It seems equally clear that they are under the duty of publishing, as far as may be possible, the not less important law promulgated through the decisions of the courts.¹ In England, the reporters, at least since the termination of the Year Books, have been unofficial persons; and at no time has the government undertaken the printing of current reports.² In the United States, on the contrary, there has been a steady tendency towards official reporting; and to-day the reporters of the Supreme Court of the United States and of most, perhaps of all, of the State courts of last resort, are public officials, duly elected or appointed. No one believes that official reports are free from faults. Bacon long ago pointed out that judges should not control the reports;³ and perhaps official reporters are too likely to be hampered by their connection with the judges, of whom they are sometimes appointees, and to whom, because of statute or

¹ 5 Bentham's Works, 235; "The Reporting System," 7 Law Rev. 223 (1848); J. Westlake, "On Legal Reporting," 2 Juridical Society Papers, 745 (1863); Daniel's History of the Law Reports, 5-14, 16-21, 24, 30-32.

"In any other country but this, it would be considered as much the duty of the Government to publish the decisions of the Superior Courts, as to publish the enactments of the Legislature. Both are in this country of equal importance to the public; for, without the study of both, no useful knowledge of English law can be acquired." Lord Justice Lindley, in Daniel's History of the Law Reports, 65.

² See Lord Westbury, quoted in § 98, n.

"The sole fruit of Lord Bacon's attempt to reform the system of reporting, was the appointment of Hetley by the judges as reporter in the Common Pleas, and Hetley's reports are not valued." George Sweet, "The Expediency of Digesting the Precedents of the Common Law, and Regulating the Publication of Reports," 2 Juridical Society Papers, 577, 584 (1862).

³ See the quotation in § 98, n.

custom, they almost always yield acquiescence in selecting and editing cases. Besides, it is obvious that official reporters are not necessarily skilful. Nevertheless, it must be conceded that official reports are quite as good as unofficial reports of the same cases, — usually better, — and that, even at their worst, official reports are entitled to the credit of being a serious attempt on the part of government to perform a duty easily ignored.

CHAPTER XI.

DIGESTS.

§ 110. *The Abridgments.*

Statham's Abridgment, published about 1470, Fitzherbert's Abridgment, published about 1516, and Brooke's Abridgment, published in 1568, condense the early cases under topics alphabetically arranged. On account of the fulness of these abridgments, and on account of the fact that, at the time of the publication of the latest of them, most of the Year Books and other early reports were still in manuscript, it seems that the abstracts found in the abridgments were largely used by early lawyers as substitutes for the cases themselves.¹ Fitzherbert's Abridgment is still used as the most convenient guide to cases in the Year Books.

There are many later abridgments, the chief ones being Rolle, published in 1668, Bacon, published in 1736-1766, Viner, published in 1741-1751, and Comyns, published in 1762-1767. Rolle has been superseded by Viner; but Bacon, Viner, and Comyns, each of which has appeared in several editions, remain to this day useful guides to the state of the law at the interesting and important period when the chief English colonies in America became independent.

¹ "This I know, that abridgments in many professions have greatly profited the authors themselves: but as they are used, have brought no small prejudice to others: for the advised and orderly reading over of the books at large, in such manner as elsewhere I have pointed at, I absolutely determine to be the right way to enduring and perfect knowledge; and to use abridgments and tables, and to trust only to the books at large; for I hold him not discreet that will *sectari rivulos*, when he may *petere fontes*." 4 Co., preface, x-xi.

Of all the abridgments, it must be said that, though they serve to a great extent the purpose of digests, they more or less closely resemble collections of text-books; for they do not give all the reported cases, and they do indicate the views of the authors. The abridgments have also some features of reports, for they contain notes, sometimes very full notes, of cases not elsewhere reported.

§ 111. The English Digests.

While the abridgments still retain interest as pictures of past law, they are not much used by practitioners in search of the law now prevalent. For living law one goes to the digests, which differ from the abridgments by attempting to summarize all reported cases and to suppress the views of the compiler. It is important that a digest be kept up to date. Hence all digests become obsolete in a few years. It is a peculiarity of the English digests still in use that some of them are restricted to chancery cases and some to cases in the common-law courts. To gather all English cases since the Year Books, the investigator must now examine at least three digests and several supplemental volumes.¹

§ 112. The American Digests.

There are several digests of cases decided in the Supreme Court of the United States; and each State has at least one digest. Cases in all courts, Federal and State, down to the year 1870, are found in the United States Digest, first series;

¹ Cases in the common-law courts before the reign of George III. are found in Coventry & Hughes' Digest, which professes to go back to the beginning of Henry III.'s reign, but which contains few cases from the Year Books. Common-law cases from 1756 to 1883 are found in Mews' Fisher's Digest, edition of 1884. Chancery cases from the earliest times to 1883 are found in Chitty's Equity Index, edition of 1883-1889. Cases later than Mews' Fisher and Chitty are found in various supplementary volumes.

and the later cases from all jurisdictions are found in annual volumes.

§ 113. Special Digests.

For some subjects, for example, Insurance and Patents, special digests have been prepared. A special digest somewhat resembles a treatise ; but it differs from a treatise in that it purports to contain all the cases, is arranged in an alphabetical order, and does not contain comments.

§ 114. The Plan of a Digest.

Any one having occasion to make frequent use of a digest will find it almost indispensable to master the plan upon which that digest is constructed. Plans differ considerably, and hence it seems impracticable to describe a digest minutely in this place ; but an attempt will be made to point out the chief features of such digests as seem to be most carefully compiled.

§ 115. Classification.

In preparing a digest, the first step is an attempt to make a classification of topics. What is aimed at is not a classification satisfactory to an analytical jurist, but one useful to a practising lawyer. There is danger that the classification may not be sufficiently minute. For example, a classification containing only such general titles as Contracts, Criminal Law, Pleading, Real Property, and Torts, would not answer the purpose of the lawyer in haste for authorities. On the other hand, if a large subject is minutely subdivided, and if the subdivisions of all subjects are treated as separate titles and are thrown into one alphabetical arrangement, the result inconveniences the lawyer ; for it is advantageous to have related subdivisions so placed that the searcher can turn easily from one to the other ; and, besides, even an elaborate system of cross-references cannot wholly remove the embarrassment caused by the fact that many points fall

in one subdivision of a large subject quite as naturally as in another. For example, Offer, Acceptance, and Revocation are kindred subdivisions ; and as the cases in one of these subdivisions often throw light upon the cases in another, and as it may be doubtful whether cases as to priority of Acceptance and Revocation belong in one subdivision or in another, it is convenient to have the subdivisions placed in juxtaposition under the title of Contracts. When one subdivision belongs equally in several subjects, it is usually advisable to treat it as a separate title and to use cross-references. For example, Fraud may well be placed by itself, with cross-references to and from Contracts, Equitable Jurisdiction, Torts, and other titles. When any one case or part of a case belongs under several titles, it is usually best to print that case or part of a case in each place ; for cross-references, though useful, distract the attention and should be avoided, if possible, even at the expense of enlarging the volume somewhat.

The plan here described results in an alphabetical series of rather long titles, each title containing subdivisions usually arranged in a logical order, with cross-references whenever requisite.

§ 116. The Form of the Paragraphs.

Each paragraph is a head-note, or a part of a head-note.¹ An unusually careful digester does not rely upon reporters' head-notes, but makes his own. This course causes great labor, but it secures accuracy and uniformity. One who uses reporters' head-notes cannot be certain that his digest is accurate, and he very well knows that paragraphs taken from divers reporters are constructed in divers ways, even for cases of the same nature, the paragraphs being indiscriminately of the long or short or intermediate form. Digests composed chiefly of head-notes of the intermediate form are

¹ See § 34.

most common.¹ What has heretofore been said as to framing head-notes² is pertinent here ; and it need only be added that the digester should be even more careful than the reporter in so framing his head-notes as to indicate, when necessary, that a case depends upon a statute or that a certain statement is a *dictum*.

§ 117. The Order of the Paragraphs.

The usual arrangement of paragraphs under any one subdivision is chronological. If a digest covers many jurisdictions and the paragraphs under a subdivision are very numerous, it is customary to place the jurisdictions in alphabetical order.

§ 118. Other Details.

The digester attempts to select for the alphabetically arranged titles such brief and appropriate designations, descriptive of the contents, as will naturally occur to the lawyer in search of the matters inserted thereunder;³ and the at-

¹ See § 30.

² See §§ 28-33.

Head-notes of the intermediate form, as distinguished from head-notes of the long form, are recommended by Lord Justice Nathaniel Lindley, in the following passages from an article on "The History of the Law Reports," 1 Law Q. Rev. 137, 148, 149 (1885): "There are too many facts introduced, and the law is not sufficiently extracted. . . . Comyns' Digest . . . is almost perfect in this respect. . . . A digest ought not to be a classified mass of the head-notes of the reports ; it should be a classified mass of principles and rules, with no more facts than are necessary to indicate differences."

³ "The titles should be such as are likely to occur to those who consult the digest. . . . Again, speaking generally, a heading should not begin with an adjective, but should be a substantive. For example, such headings as 'Education' and 'Schools' are better than 'Elementary Education' and 'Endowed Schools.' 'Lease' is better than 'Renewable Lease,' which should be a subheading of 'Lease.' 'Debt' is better than 'Specialty Debt,' which should be a subheading of 'Debt.'" Lord Justice Lindley, "The History of the Law Reports," 1 Law Q.

tempt to accomplish this difficult task is supplemented by the insertion of many titles containing simply cross-references to the titles preferred by the digester. Further assistance is rendered to the searcher by marking important catch-words with bold type or by using other typographical devices. A complete digest contains a table of cases, showing where each case is digested and thus affording an easy key to the volumes. Another useful feature of many digests is a table of overruled and doubted cases.¹ To enumerate all the difficulties and details of a digester's task is impracticable; but enough has been said to show that a digester's task is delicate and laborious, and that any one using a digest will do well to master the theory governing the arrangement of its contents.

Rev. 137, 147-148 (1885). The article contains other interesting suggestions as to digests.

¹ There are some separate works with this special purpose. Dale & Lehmann's *Digest of Overruled Cases*, 1756-1886, and Talbot & Fort's *Index of Cases Judicially Noticed*, 1865-1890, cover English cases; and Bigelow's *Overruled Cases* covers both English and American cases.

CHAPTER XII.

BRIEFS.

§ 119. **Briefs in England and in America.**

Any abstract or memorandum intended to guide a lawyer's work in court or in preparatory investigations may properly be called a brief; but in England and in America the word has special meanings. In England a brief is prepared by the solicitor for the use of the barrister and is intended to contain only such matter as will indicate to the barrister the essential features of the case in which he is employed; and hence the English brief contains an abstract of the pleadings, and, if a trial of fact is contemplated, an abstract of the expected evidence, with the names of the witnesses and a description of their peculiarities. Thus the English brief tells what the case is, but does not argue it; and commonly it deals with facts rather than with law. In America, on the other hand, a brief is a skeleton of an argument, and commonly, though not invariably, deals with law rather than with facts; and besides, as the old divisions of the profession do not exist in the United States, the American brief is prepared by the person who is to make the argument or by his representative. Either before or after the argument, the American brief is often handed to the court; but the English brief is for the guidance of counsel only.

This chapter is intended to explain the method of constructing a brief for use in an American court.

§ 120. **The Statement.**

The first step is to make a rough draft of a statement of the case, giving points as to pleadings, procedure, and facts,

to the extent necessary to show distinctly the questions now presented to the court. A statement usually gains in clearness by being arranged in chronological order. The rough draft will be amended as work on the brief proceeds; for, in advance of careful investigation of the law, the lawyer, even though he be not a beginner, cannot be sure that he has inserted all material points and no others.

§ 121. The Questions.

The questions presented to the court, unless they very clearly show themselves upon the face of the statement of the case, are next to be ascertained and announced; and in the brief they usually should be collected under one heading and distinguished from one another by numbers or otherwise. The phrasing of the questions is a delicate and important task. The lawyer who gives the court a lucid picture of the case and of the questions presented has gained at the outset the advantage of being thoroughly understood. It is sometimes said that the lawyer who thus at the beginning has firmly grasped the court's mind is almost sure to win; but it seems better to say that he is simply sure to please, and that as a rule a clear presentation eventually aids the stronger side of the case.

§ 122. The Argument: Independent Arguments.

After the questions comes the argument. Sometimes the questions are practically independent, any one of them being conclusive of the litigation. For example, in a jurisdiction where private seals have their ancient force, the validity of a contract may be supported by a discussion of the following independent problems: (A) the question whether the contract was under seal; and (B) the question whether the contract had a consideration. In such a case, as there are really separate arguments, it is advantageous to keep the arguments distinctly severed, and to treat the litigation much as if there

were in fact two or more distinct litigations. the separation being emphasized by the use of special titles, aided by letters or numerals or other devices.¹

§ 123. The Argument, continued: A Chain of Propositions.

Each separate argument consists almost necessarily of a chain of propositions. Each proposition must be separately stated and must be distinguished by a letter or a numeral. Propositions tending to support some one proposition should be placed under it, with such lettering or other marks as will indicate that they are subordinate to it. This is only one application of the general principle that perception of the relation of propositions to one another is absolutely essential, and that, for the benefit of the brief-maker as well as for the benefit of the court, it is important to indicate the relation as clearly as possible.

§ 124. The Argument, continued: Familiar Law.

Familiar propositions of law seldom need to be directly stated. Usually they are assumed; but nevertheless it sometimes adds coherence to a chain of reasoning to mention familiar propositions indirectly. Thus, counsel may find it useful to say that he relies upon what he conceives to be the real reason for the familiar rule requiring a simple contract to be supported by a consideration; or he may say that certainly no one will question the familiar rule requiring a father to pay for necessities furnished to his minor child, but that the real problem is whether the goods in question were necessities. Indeed it often happens that the solution of a case requires nothing but a careful examination of the reasons and limitations belonging to a perfectly familiar rule of law.

¹ See §§ 22-26.

§ 125. The Argument, continued: The Order of Propositions.

Avoiding, then, the direct statement of the most elementary principles, the framer of a brief places in as effective order as possible the propositions leading to the desired conclusion. What this order is, depends upon the peculiarities of each case and upon the taste of counsel; but the order is almost certainly not the stiff scholastic order of a syllogism.

§ 126. The Argument, continued: The Support of Propositions.

Counsel must be prepared to support each proposition by direct authorities or by analogies found in the law or by an explanation of the convenience and justice underlying the proposition.¹

The direct authorities should be cited in the brief, and of course should be placed under the appropriate propositions. Although the dates of authorities should usually be given, a chronological order is not essential, and a geographical or a logical order is often preferable.

The question whether the brief shall contain, besides the citation of the names of the cases relied upon, full statements of those cases and pertinent extracts from the opinions, depends upon the question whether the brief is to be the only argument submitted. If there is to be an oral argument, the full statement of the authorities may preferably be omitted from the brief; but if the case is to be submitted on the brief alone, the brief must give the pith of the most important authorities.

Similarly, a decision of the question whether there is to be an oral argument carries with it a decision of the question whether the brief must contain an adequate, though of course in no case a verbose, explanation of the reasons based on analogy and convenience and justice. If there is to be an

¹ See §§ 69-74, 85-96

oral argument, it is usually well not to state these matters in the brief. This is emphatically the wise course if it is the practice for counsel to exchange briefs; for professional courtesy does not require one to aid one's adversary to the extent of making known the whole argument in advance.

§ 127. The Argument, continued: Attacking the Adversary.

If the brief covers the questions really involved in the case, it necessarily answers the contentions of opposing counsel. A more specific answer is usually unnecessary, with the exception that, especially if there is to be no oral argument, the brief may well indicate under the appropriate propositions the defects of the adversary's chief authorities and of the other foundations upon which his propositions rest.

§ 128. Finding Authorities.

What has been said assumes that at the beginning the framer of the brief was acquainted with the general nature of the questions of law involved in the case, and foresaw what propositions probably would be essential to the support of his contentions. If such preliminary acquaintance with the law be wholly wanting, the first step must be to master the elements of the law as to the subjects involved in the litigation. Assuming that the necessary preliminary acquaintance with the law has been acquired, and that the essential propositions have been sketched, it is now necessary to gather authorities in support of the propositions.

In the search for authorities, it is extremely important to ascertain at the outset whether there is a statute in any way affecting the case. For ascertaining the existing statutory law it is usually sufficient to examine the latest revision of the statutes of the appropriate jurisdiction and the subsequent volumes of session laws; but if the cause of action arose before the date of the last revision, or if in any other

way the case can turn upon an early statute, as may happen especially if an old deed or will or official act is concerned, a further search for statutes is necessary.

The next step is to search for local decisions. For such precedents use must be made of the local digests, the indexes to the latest reports, and the subsequent periodicals. Next comes the search for cases in other jurisdictions; and in this search one begins with text-books and large digests,¹ and ends with annual digests and recent reports and periodicals. As soon as one pertinent case is found, the search for authorities becomes comparatively simple. With that one case as a key, the searcher by using the tables of cases finds the places where the text-books and the digests have placed that case and like ones. Similarly, almost any pertinent case leads to others if use is made of the volumes, or special indexes in digests, which give references to places where cases are overruled or otherwise noticed.²

§ 129. Abstracting Authorities.

Of course each statute or case is examined; and if it turns out to be in point either for or against a proposition in the brief, a careful note must be made. In making a note of a statute, one needs the very words. In dealing with a case, however, one simply makes a head-note, usually including the essential facts after the fashion of a head-note of the intermediate form,³ quotes any striking language found in the opinion,

¹ See §§ 111-113. Unfortunately there is no American digest covering all courts and coming down to the present time. A quick way to find many of the best American cases is to search Rapalje's Digest of the American Decisions and American Reports. The American and English Encyclopædia of Law, though not in form a digest, serves as an index to thousands of cases.

² See § 118. For the same purpose profitable use may be made of the adhesive slips of references now prepared for the reports of almost every jurisdiction.

³ See § 30.

and adds the date of the case and any necessary comments upon its weight as an authority.

§ 130. **Selecting Authorities.**

Although the brief-maker would be glad to find all the authorities, both favorable and adverse, he usually cannot spare the time to find all, and he seldom inserts in the brief all the favorable results of his search. He selects his best authorities. He knows that the court is overworked; and he knows, too, that in these days of numerous courts and of almost innumerable precedents, a careful judge cares not for number of authorities but for weight. Hence the brief-maker selects well-reasoned cases from the most influential jurisdictions;¹ and, depending slightly, or not at all, upon his weaker cases, he attempts to show that the doctrine of his chosen cases is just and in harmony with the analogies of the law.²

¹ See §§ 63-64, 85-92.

Commenting upon "the ancient order of arguments by our sergeants and apprentices of the bar," Coke said:—

"In those days few cases in law were cited, but very pithy and pertinent to the purpose, and those ever pinch most; and now in so long arguments with such a farrago of authorities, it cannot be but there is much refuse, which ever doth weaken or lessen the weight of the argument. This were easily holpen, if the matter (which ever lieth in a narrow room) were first discerned, and then that every one that argueth at the bar would either speak to the purpose or else be short." 10 Co. preface, xxi-xxii.

And see Mr. Justice S. F. Miller, "The Use and Value of Authorities," 23 Am. L. Rev. 165, 174-177 (1889); Robinson's Forensic Oratory, § 150.

² See §§ 53, 73-74, 84, 93-96.

"He best argues his cases who considers not how he can match his facts with precedents, as he might match from his hand in a game of dominoes, but how he can best rest the judgment that he seeks upon the right and reason of the law." Edmund Wetmore, "Some of the Limitations and Requirements of Legal Education in the United States," an address before the American Bar Association (1894).

§ 131. Revision : Summing up.

From time to time the framer of the brief, gaining new knowledge from his examination of the authorities, amends his rough draft of the statement and of the questions and of the propositions. After the final revision, some lawyers place at the beginning of the brief, or even on the titlepage, a legal maxim or other pithy sentiment indicating the subject of the argument and the general view urged. When such a sentence can be culled from a reputable authority, it seems well to put it in a conspicuous place ; for this aids the general purpose of a brief, which is simply to make a quick and incisive and permanent entrance into the mind of the court. Yet for any expression of one's position and of the reasons sustaining it, however concise and forcible that expression may be, a sufficiently conspicuous, and usually a preferable, place may be found in the brief itself. Indeed, it seems clear that for peculiarly condensed and conclusive expressions the most appropriate place is usually found at the very end of the brief ; for it is requisite to leave upon the mind of the court a distinct final impression, and generally this result is best attained by closing with a clear and emphatic summary.

BOOK II.

CASES FOR STUDY.

Case 1. — State v. Baughman.

THE STATE *v.* BAUGHMAN.

OHIO SUPREME COURT, JANUARY TERM, 1882.

[38 *Ohio St.* 455.]

QUO WARRANTO.

George K. Nash, Attorney-General; *Coates Kinney*, *Horace Sabin*, and *James Winans*, for plaintiffs.

Little & Shearer, for defendant.

JOHNSON, J. This petition was filed by the Attorney-General in obedience to the following joint resolution of the General Assembly, passed April 17, 1882 (79 Ohio L. 246):

“Joint resolution, directing the Attorney-General to institute a suit in *quo warranto*.

“Whereas, A special act entitled ‘An Act to establish a Police Force in the City of Xenia,’ passed March 25, 1880 (77 Ohio L. 350), withdrew from that city all the police powers vested in it by the general laws for cities of its grade (sections 2023–2030 Revised Statutes), and lodged them in a board of police commissioners appointed by the Court of Common Pleas of Greene County; abolished the office of marshal of the said city, without repealing the general law (section 1707, Revised Statutes), which provides that ‘the officers of a city of the second class shall consist of a mayor, marshal,’ etc.: and authorized the payment of salaries to the

said police force out of the general fund of the city, and also the levy of a tax for such payment other than and additional to that provided for by the general law (section 2683, clause 21, Revised Statutes) ; and 37

“ *Whereas*, This special act raises constitutional questions whose judicial settlement would be of great value to the General Assembly, namely :—

“(1) Whether, while ‘the General Assembly shall pass no special act conferring corporate powers,’ it may pass a special act withdrawing corporate powers ;

“(2) Whether, while a city must be organized by general laws (Cons. Art. XIII. section 6), it may be or would be disorganized by a special law through the abolition of one or more of its organic offices ; 70

“(3) Whether a tax already levied and collected by a municipal corporation for one purpose can be diverted to another by a special act of the General Assembly ; and X

“(4) Whether the conferring, by special act, of a power of taxation on a municipal corporation other than and additional to that authorized by the general laws comes within the inhibition of section 1 of Article XIII. of the Constitution ; therefore, ✓

“ *Resolved by the General Assembly of the State of Ohio*, That the Attorney-General is hereby directed to institute a proper action in *quo warranto* against the police commissioners appointed under the said special act, inquiring by what authority they hold their offices or trusts, and to procure, if practicable and as soon as practicable, a decision of the Supreme Court on the several constitutional questions herein suggested.

“ ISAAC N. HATHAWAY,

“ *Speaker pro tem. of the House of Representatives.*

“ R. G. RICHARDS,

“ *President of the Senate.*

“ Passed, April 17, 1882.”

THE STUDY OF CASES.

The object of this resolution, as well as of the petition in this case, is to inquire by what authority the defendants are assuming to act as police commissioners of the city of Xenia. It is claimed that the Act of March 25, 1880 (77 Ohio L. 350), to establish a police force in said city, is unconstitutional; and hence that defendants are usurping their offices. The defendants allege that they have been duly appointed and qualified, and are acting as such officers under authority conferred by said act. To this defence the State demurs, and the issue thus presented involves the validity of the above-named act, which in terms authorizes the appointment of a police board for said city, and vests in such board the general police powers of cities of that class. It is a special act, and applies to the city of Xenia only. It authorizes the Court of Common Pleas of Greene County to appoint three commissioners, in whom are vested the power to appoint, control, and discipline the police force of said city, and to make rules for their own government, have an organization, keep records, hold regular meetings, appoint a chief of police and his subordinates, and fix their compensation. The powers, which by law were vested in the city marshal, were transferred to the members of the police force so appointed, and the office of marshal was abolished. Section 7 of the act requires the city council to levy and certify annually to the county auditor a tax not exceeding one mill on the dollar to defray the salaries and expenses of the new police force, to be collected as other taxes, and provides that until a revenue is derived from this source the salaries of the force are to be paid out of the general fund of the city.

The joint resolution, in obedience to which this action is commenced, is preceded by a preamble which recites that "this special act raises several constitutional questions whose judicial settlement would be of great value to the General Assembly."

The questions suggested in the preamble, and on which

the Attorney-General is directed to procure a decision of the Supreme Court as soon as practicable, are four in number, the first and second of which involve the validity of those provisions of the act conferring upon the police commissioners the police powers of the city of Xenia, and withdrawing that city from the provisions of the General Statutes governing like municipal corporations. The third and fourth questions involve the validity of the provisions of the 7th section, relating to the levy of a tax to pay the salaries of the new force, and to the temporary use of the general fund for that purpose until the tax can be collected. 132

It is only so far as these several questions are involved in the determination of the *title* to the offices in question that this court is authorized to answer them. It is by the organic law a court of limited original jurisdiction. By Article IV. section 2, its original jurisdiction is expressly limited to *quo warranto*, *mandamus*, *habeas corpus*, and *procedendo*. The sole office of a judicial proceeding by *quo warranto* in such a case is to inquire by what authority these defendants are exercising the functions of police commissioners. A decision on any of the questions suggested, not necessary to a determination of the right of defendants to exercise these functions, would not be a judicial settlement of such questions, but would be without authority conferred by the Constitution to make it. To be a judicial settlement the question decided must arise in a judicial proceeding, properly before a court of competent jurisdiction. The division of the powers of the State into legislative, executive, and judicial, and the confiding of these powers to distinct departments, is fundamental. 33

It is essential to the harmonious working of this system that neither of these departments should encroach on the powers of the other. If the judiciary were to assume to decide hypothetical questions of law not involved in a judicial proceeding in a cause before it, even though the decision

THE STUDY OF CASES.

"would be of great value to the General Assembly" in the discharge of its duties, it would, nevertheless, be an unwarranted interference with the functions of the legislative department that would be unauthorized, and dangerous in its tendency. Not only this, but it would be an attempt to settle questions of law involving the rights of persons without parties before it, or a case to be decided in due course of law, thus violating that provision of the Bill of Rights which declares that every person shall have a remedy for an injury done him by due course of law. Const. Art. I. § 16.

In some of the States, Massachusetts included, the Constitution authorizes the legislature and the governor to require of their highest judicial tribunal its opinion on important questions of law, the decision of which becomes necessary to the discharge of their public duties. Even under such a provision the judiciary must confine itself to an opinion on such questions as are involved in, or necessary to, the discharge of a public duty by the inquiring body. This power does not include the right to require an opinion on abstract or hypothetical questions, however valuable as a future guide, nor on such questions as affect private rights merely. Opinion of the Supreme Court, Mass., 122 Mass. 600; Id., 126 Mass. 557.

The third and fourth questions suggested by the joint resolution are not involved in the issue before us. They are: 1st. Whether that provision of the 7th section which authorizes the city council to use the general fund of the city to pay the salaries of the new force until funds can be realized from the special levy, is valid; and, 2d, Whether the power to make this special levy is valid.

It is claimed that these provisions are the conferring of corporate power by special act within the inhibition of Section 1, Article XIII., of the Constitution.

The solution of this question is not involved in the case at bar. We may concede, for the purposes of this case, that

STATE v. BAUGHMAN.

the whole of section 7 is unconstitutional, and yet those provisions creating the board of police commissioners would not be affected.

The authority of the police board does not depend upon the power of the city council to levy this tax, nor to their temporarily using the general fund of the city until collections can be made of the special tax.

Again, no case is made for invoking judicial action on the powers conferred upon the city council by section 7. For aught that appears this section has been treated as null and void.

It is not asserted, either in the joint resolution or in the petition, that the city council has ever attempted to exercise either of the powers conferred by section 7. When such an attempt is made, the law furnishes an ample remedy, if the section is invalid. That remedy is not by *quo warranto* against the police commissioners, but by a proper action against the city council, or those engaged in the levying and collecting the tax. In this matter the police commissioners have no power, nor are they charged with any duty.

The first and second questions suggested by the resolution are, however, involved in this proceeding. They are the same in substance as were considered and decided in *State ex rel. Attorney-General v. Covington*, 29 Ohio St. 102, where the power of the legislature to create such a board was directly presented. That case arose under an act to regulate the police force of Cincinnati (73 Ohio L. 70). The provisions of that act were substantially the same as the one now before us. Like this, it was a special act. The same constitutional objections were made to it as are urged against this.

That act had similar provisions as to the appointment and powers of the commissioners and of the force under their control, and also as to raising money to defray expenses and salaries as this has. Its provisions, like the act before us,

THE STUDY OF CASES.

created a police board, and clothed it with power over the police ; and it was held not to be a law of a general nature, nor one conferring corporate powers, nor in conflict with any clause of the Constitution relied on here. That case was ably argued and maturely considered. It covers the whole ground. We see no reason to re-examine these questions.

As to the validity of the provisions of section 7 of this act, no case is made requiring judicial settlement, and the same was true in the Covington case under that act. The demurrer to the answer is overruled.

*Judgment for defendants.*¹

Case 2. — *Houston v. Williams.*

HOUSTON *v.* WILLIAMS *et al.*

CALIFORNIA SUPREME COURT, APRIL TERM, 1859.

[13 Cal. 24.]

APPEAL from the Third District.

This was an action of ejectment. The defendant recovered judgment in the District Court. On appeal, the judgment was reversed in the Supreme Court from the bench, — no opinion in writing being delivered. The reasons for the decision were stated orally. The counsel for the plaintiff afterwards presented a petition asking the court to file a written opinion.

William T. Wallace, for petitioner.

Spencer & Rhodes, for respondent.

FIELD, J., delivered the opinion of the court. TERRY, C. J., concurring.

At the present term the judgment in this case was reversed, without any opinion being given setting forth the rea-

¹ Matter of the Application of the Senate, 10 Minn. 78 (1865), *accord.*

See §§ 1-5, 62.

sons for the reversal. The appellant now moves the court to file an opinion, and cites section 69 of the statute of May 15, 1854, amending the practice act, which provides that "all decisions given upon an appeal in any appellate court of this State shall be given in writing, with the reason therefor, and filed with the clerk of the court," except in cases tried in the County Court, on appeal from a justice's court.

The provision of the statute had not been overlooked when the decision was rendered. It is but one of many provisions embodied in different statutes by which control over the judiciary department of the government has been attempted by legislation. To accede to it any obligatory force would be to sanction a most palpable encroachment upon the independence of this department. If the power of the legislature to prescribe the mode and manner in which the judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension; but where is the limit to this power if its exercise in any particular be admitted?

The truth is, no such power can exist in the legislative department or be sanctioned by any court which has the least respect for its own dignity and independence. In its own sphere of duties, this court cannot be trammelled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions. The legislature can no more require this court to state the reasons of its decisions than this court can require, for the validity of the statutes, that the legislature shall accompany them with the reasons for their enactment. The principles of law settled are to be extracted from the records of the cases in which the decisions are ren-

THE STUDY OF CASES.

dered. The reports are full of adjudged cases in which opinions were never delivered. The facts are stated by the reporter, with the points arising thereon, and are followed by the judgments rendered; and yet no one ever doubted that the courts, in the instances mentioned, were discharging their entire constitutional obligations: See, by way of illustration, cases in 1 Conn., in 1 Brock. Va. Cas., and in 4 Har. & M.

The practice of giving the reasons in writing for judgments has grown into use in modern times. Formerly, the reasons, if any were given, were generally stated orally by the judges and taken down by the reporters in short-hand. 1 Bla. Com. 71.

In the judicial records of the king's courts, "the reasons or causes of the judgment," says Lord Coke, "are not expressed, for wise and learned men do, before they judge, labor to reach to the depth of all the reasons of the case in question, but in their judgments express not any; and in truth, if judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like *elephantini libri*, of infinite length, and, in mine opinion, lose somewhat of their present authority and reverence; and this is also worthy for learned and grave men to imitate." Co., pt. 3, pref. 5.

The opinions of the judges, setting forth their reasons for their judgments, are of course of great importance in the information they impart as to the principles of law which govern the court and should guide litigants; and right-minded judges, in important cases—when the pressure of other business will permit—will give such opinions. It is not every case, however, which will justify the expenditure of time necessary to write an opinion. Many cases involve no new principles, and are appealed only for delay. It can serve no purpose of public good to repeat elementary

principles of law which have never been questioned for centuries.

The court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment, and if one is given, whether it shall be orally or in writing. In the exercise of that discretion, the authority of the court is absolute. The legislative department is incompetent to touch it.

With the expression of these views, we might close this opinion by denying the motion ; but it will not be impertinent to the matter under consideration to say a few words as to the control of the court over its opinions and records. There are some misapprehensions on the subject, arising chiefly from a confusion of terms, and from a misconception of the relation of the different departments of government to each other, and the entire independence in its line of duties of the judiciary. The terms "opinions" and "decisions" are often confounded, yet there is a wide difference between them, and in ignorance of this, or by overlooking it, what has been a mere revision of an opinion has been sometimes regarded as a mutilation of a record. A decision of the court is its judgment ; the opinion is the reasons given for that judgment. The former is entered of record immediately upon its rendition, and can only be changed through a regular application to the court, upon a petition for a rehearing, or a modification ; the latter is the property of the judges, subject to their revision, correction, and modification, in any particular deemed advisable, until, with the approbation of the writer, it is transcribed in the records. In the haste of composition, some errors will occur ; in the copying, several ; in the printing, many. There will also be, at times, expressions of opinion on incidental questions, too strong and unqualified. All these errors, whether in language, form, or substance, should be corrected before a publication is permitted, as an authoritative exposition of the law, and, as such,

THE STUDY OF CASES.

binding upon the court. The power of enforcing a correct publication, when the publication is authorized, cannot reasonably be denied. In no civilized state, except in California, has the existence of this power ever been doubted. Every judge, from the chief justice of the Supreme Court of the United States down, claims, and exercises, without question, the right of revision, including thereby modification and partial suppression of his opinions. In the recent case in relation to the Sutter grant, we are informed that application was made for a copy of the opinion delivered, and that the application was refused, on the ground that Mr. Justice Campbell, who delivered it, wished to revise it before it left the clerk's office. When the opinions have been revised and finally approved and recorded, then they cease to be the subject of change. They then become like judgment records, and are beyond the interference of the judges, except through regular proceedings before the court by petition.

The records of the courts are necessarily subject to the control of the judges, so far as may be essential to the proper administration of justice. The court hears arguments upon its records ; it decides upon its records ; it acts by its records ; its openings and sessions and adjournments can be proved only by its records ; its judgments can only be evidenced by its records, — in a word, without its records it has no vitality. Legislation which could take from its control its records would leave it impotent for good, and the just object of ridicule and contempt. The clerk, it is true, is a constitutional officer — not subject to appointment or removal by the court — but subject, in the control of the records, to its orders. It is true, the court cannot, without great abuse of its powers, take, directly or indirectly, from the clerk the perquisites of his office for copies of opinions and papers on file, nor authorize the destruction or mutilation of any of the records, but, subject to these limitations, it must necessarily exercise control, that justice may be done to litigants before it.

The power over our opinions and the records of our court we shall exercise at all times while we have the honor to sit on the bench, against all encroachments from any source, but in a manner, we trust, befitting the highest tribunal in the State. We cannot possibly have any interest in the opinions except that they shall embody the results of our most mature deliberation, and be presented to the public in an authentic form, after they have been subjected to the most careful revision.

*Motion denied.*¹

Case 3. — Webb v. Bell.

WEBB v. BELL *et alios*.

KING'S BENCH, HILARY TERM, 21 & 22 CAR. II.

[1 *Sid.* 440.]

THE case before argued was now argued again, to wit, trespass for breaking a close and for treading down grass,² and for taking two horses with harness by which they were fastened to a cart laden with grain, etc. The defendants plead as to the coming with force and arms and as to the breach of the peace, Not guilty. And as to the remainder of the trespass that say that J. S. had a rent service of so

¹ Speight v. People, 87 Ill. 595 (1877), and Vaughn v. Harp, 49 Ark. 160 (1886), *accord*. *A fortiori*, in the absence of a special constitutional requirement judges cannot be compelled to compose head-notes. *Ex parte* Griffiths, 118 Ind. 83 (1889).

See §§ 14-17, 27, 43-45, 85-87, 98-99, 105-107, 109.

² The original report is in Norman French, with abbreviated quotations from the old Latin forms, thus: "Trespass quare clausum fregit, et herbam pedibus ambul. etc." The full Latin phraseology is sufficiently indicated by the following quotation from Robinson's Entries, 453: "W. B. nuper de Stamford in comitatu predicto yeoman attachiatus fuit ad respondendum J. W. de placito quare vi et armis clausum ipsius J. apud N. fregit ac herbam suam ad valentiam centum solidorum ibidem nuper crescentem pedibus ambulando conculcavit et consumpsit . . . et alia enormia ei intulit ad grave dampnum ipsius J. et contra pacem domini regis."

much per annum (and they set it out with particularity) issuing out of the land where the trespass is laid, and by reason of so much in arrear the defendants, by the instruction of J. S., entered and distrained the said horses and harness which were fixed to a cart laden with grain (as above); and after several debates the court was of opinion that the distress was well taken.

(But, inasmuch as the destruction of the grass (in the declaration) is not answered nor traversed by the defendant, judgment for that cause alone was given for plaintiff.

A Note that a horse on which a man is riding cannot be distrained for rent. *Quære* in this case if a man had been on the cart whether all the team should not be privileged.

D But the Chief Justice said that a horse on which one is riding can be distrained damage feasant, and *semble* that it should be led to the pound with the rider on it.¹

Case 4. — Simpson v. Hartopp.

SIMPSON v. HARTOPP.

COMMON PLEAS, MICHAELMAS TERM, 18 GEO. II. '45

[*Willes*, 512.]

THE opinion of the court was delivered, as follows, by WILLES, Lord Chief Justice. Trover. This comes before the court on a special verdict found at the Leicester assizes, held at Leicester on the 3d of August, 1743.

The plaintiff declared against the defendant for that on the 20th of October, 1741, he was possessed of one frame for the knitting, weaving and making of stockings, value £20, as of his own proper goods, and being so possessed he lost the same, and that afterwards, to wit on the 18th of August, 1742, it came to the hands of the defendant, who knowing

¹ See §§ 13-16, 55-56, 91-92, app. I.-III.

The Chief Justice was Sir John Kelyng.

the same to be the goods of the plaintiff, afterwards, to wit, on the 19th day of the same month of August, converted the same to his own use ; damage £30.

The defendant pleads not guilty ; and the jury find that the plaintiff on the 27th of March, 1741, was possessed of one frame for knitting, weaving and making stockings, value £8, as his own proper goods. That upon that day he let the said frame to John Armstrong at the weekly rent of 9d., and so from week to week as long as they the said Nathaniel Simpson (the plaintiff) and John Armstrong should please ; by virtue of which letting the said John Armstrong was possessed of the said frame at the said rent until the time after mentioned, when the same was seized as a distress for rent by the defendant. That the said John Armstrong is by trade a stocking-weaver, and used the said stocking-frame as an instrument of his trade, and continued the use thereof, and his apprentice was using the said stocking-frame at the time thereafter mentioned, when the same was seized by the defendant as a distress for rent. That the said John Armstrong held of the defendant a certain messuage and tenement in the parish of Woodhouse and county of Leicester by virtue of a lease to him the said John Armstrong thereof granted by the defendant, under the yearly rent of £35, for a term of years not yet expired, and was in the actual possession of the same when the said stocking-frame was distrained for rent by the defendant. That on the 19th of December, 1751, John Armstrong was indebted to the defendant in £53 for arrears of rent of the said messuage and tenement ; and that the said stocking-frame was then upon the said messuage in the possession of the said John Armstrong, and that there were not goods or chattels by law distrainable for rent in the said messuage, without the said stocking-frame, sufficient to satisfy the said rent so in arrear at the time when the said stocking-frame was seized as a distress for the said rent. That on the said 19th of December

THE STUDY OF CASES.

the defendant entered in the said messuage and tenement, and then and there seized the said stocking-frame on the said premises as a distress for the said rent so in arrear, as the said John Armstrong's apprentice was then weaving a stocking on the same frame. And that the defendant (though often requested) hath refused to deliver the said stocking-frame to the said plaintiff, and continues to detain the same. The special verdict concludes, as usual, by submitting the matter to the opinion of the court whether the said stocking-frame was by law distrainable for the said arrears of rent or not; and if the court should be of opinion that it was not, they assess the damages of the plaintiff at £8, etc.

Upon this special verdict three questions¹ arise, —

First, Whether a stocking-frame has any privilege at all, as being an instrument of trade; or whether it be generally distrainable for rent as other goods are, even though there was sufficient distress besides.

Secondly, Though it may be so far privileged as not to be distrainable if there be no other goods sufficient, yet whether or not it may not be distrained if there be not sufficient distress besides.

Thirdly, Though it be distrainable either in the one case or the other when it is not in actual use, yet whether or no it has not a particular privilege by being actually in use at the time of the distress, as the present case is.

I shall but touch upon the two first questions, because they are not the present case; but yet it may be proper to consider them a little, to introduce the third, which is the very case now in question.

There are five sorts of things which at common law were not distrainable, —

¹ The case was twice argued; on Monday, February 6th, 1743-4, and Thursday, May 31st, 1744, by *Prime*, King's Serjt., and *Bootle*, Serjt., for the plaintiff, and by *Skinner* and *Willes*, King's Serjts., for the defendant. — REPORTER.

1st, Things annexed to the freehold.

2d, Things delivered to a person exercising a public trade to be carried, wrought, worked up or managed in the way of his trade or employ. absol. 71.

3d, Cocks or sheaves of corn.

4th, Beasts of the plough and instruments of husbandry.

5th, The instruments of a man's trade or possession. } second list, 72.

The first three sorts were absolutely free from distress, and could not be distrained, even though there were no other goods besides.

The two last are only exempt *sub modo*, that is upon a supposition that there is sufficient distress besides.

Things annexed to the freehold, as furnaces, millstones, chimney-pieces, and the like, cannot be distrained, because they cannot be taken away without doing damage to the freehold, which the law will not allow.

Things sent or delivered to a person exercising a trade, to be carried, wrought or manufactured in the way of his trade, as a horse in a smith's shop, materials sent to a weaver, or cloth to a tailor to be made up, are privileged for the sake of trade and commerce, which could not be carried on if such things under these circumstances could be distrained for rent due from the person in whose custody they are.

Cocks and sheaves of corn were not distrainable before the statute 2 W. & M. c. 5 (which was made in favor of landlords), because they could not be restored again in the same plight and condition that they were before upon a replevin, but must necessarily be damaged by being removed.

Beasts of the plough &c. were not distrainable, in favor of husbandry (which is of so great advantage to the nation), and likewise because a man should not be left quite destitute of getting a living for himself and his family. And the same reasons hold in the case of the instruments of a man's trade or profession.

THE STUDY OF CASES.

But these two last are not privileged in case there is distress enough besides; otherwise they may be distrained.

These rules are laid down and fully explained in Co. Lit. 47, a, b, and many other books which are there cited; and there are many subsequent cases in which the same doctrine is established, and which I do not mention because I do not know any one case to the contrary.

From what I have said on this head, the second question is likewise answered; for as the stocking-frame in the present case could only be privileged as it was an instrument of trade, we think that it might have been distrained if it had not been actually in use, it being found that there was not sufficient distress besides. These are the words in Carth. 358, in the case of *Vinkinstone v. Ebden*, "the very implements of trade may be distrained if no other distress can be taken."

But whether or no this stocking-frame being actually in use at the time of the distress gives any further privilege is the third and principal question in the present case. And we are all of opinion that upon this account it could not be distrained for rent for these two plain reasons:—

1st, Because it could not be restored again upon a replevin in the same plight and condition as it was, but must be damaged in removing, for the weaving of the stocking would at least be stopped if not quite spoiled, which is the very reason of the case of corn in cocks, &c.

2dly, Whilst it is in the custody of any person and used by him, it is a breach of the peace to take it. And these are two such plain and strong reasons that even if it were quite a new case I should venture to determine it without any authority at all; but I think that there are several cases and authorities which confirm this opinion.

It is expressly said in Co. Lit. 47, a, that a horse whilst a man is riding upon him, or an axe in a man's hand cutting wood, and the like, cannot be distrained for rent. In

Bracton and several other old books there is a distinction made between *catalla otiosa* and things which are in use. It was held in P. 14 H. 8, pl. 6, that if a man has two millstones and only one is in use, and the other lies by not used, it may be distrained for rent. In Read's case, Cro. Eliz. 594, it was holden that yarn carrying on a man's shoulders to be weighed could not be distrained any more than a net in a man's hand, or a horse on which a man is riding. So in Moore, 214, The Viscountess of Bindon's case, it is said that if a man be riding on a horse the horse cannot be distrained, but if he hath another horse on which he rides sometimes, this spare horse may be distrained.

I could cite many other cases to the same purpose, but I think that these are sufficient to support a point which has so strong a foundation in reason, especially since there is but one case which seems to look the contrary way, which is the case of Webb v. Bell, 1 Sid. 440, where it was holden that two horses and the harness fastened to a cart loaden with corn might be distrained for rent. But in the first place, I am not clear that this case is law; and besides it is expressly said in that case that a horse upon which a man was riding cannot be distrained for rent; and therefore a *quære* is made whether if a man had been on the cart the whole had not been privileged, which is sufficient for the present purpose, it being found that the stocking-frame was to be in the actual use of a man at the time when it was distrained.

For these reasons, and upon the strength of these authorities, we are all of opinion that this stocking-frame, the apprentice being actually weaving a stocking upon it at the time when it was distrained, was not distrainable for rent, even though there were no other distress on the premises; and therefore judgment must be for the plaintiff.¹

¹ See §§ 13-16, 42, 53, 66, 93-94.

THE STUDY OF CASES.

Case 5. — Storey v. Robinson.

STOREY v. ROBINSON *et alios*.

KING'S BENCH, HILARY TERM, 35 GEO. III. 1725

[6 T. R. 138.]

THIS was an action of trespass for an assault and false imprisonment, and for seizing and leading away the plaintiff's horse upon which he was riding.

The pleadings in this case were long ; but the questions in all of them were resolved into the point insisted upon by the defendants on the second plea, namely, that as to the seizing and taking of the horse, they distrained him *damage feasant* in the defendant Robinson's ground, and impounded him ; to which plea there was a demurrer.

Holroyd, for the demurrer, contended that a horse, on which the owner was riding, could not be distrained, Co. Lit. 47 a ; and the cases there mentioned in n. 13. In *Simpson v. Harcourt*,¹ Lord Ch. J. Willes in giving the judgment of the Common Pleas mentioned the case of *Webb v. Bell*, in 1 Sid. 440, as the only case in which it is said that a horse may be distrained with his rider on him, *damage feasant* ; and added, " I am far from thinking that case to be law." It is to be observed too that that was only a *dictum* of Ch. J. Kelyng, in Sid. and not necessary to the decision of the case.

T. Walton, contra, relied on the *dictum* of Lord Ch. J. Kelyng in *Siderfin*, it never having been expressly overruled ; observing that the opinion of Lord Ch. B. Gilbert² coincided with it. And he added that the passage cited from Co. Lit. 47 a, was applicable only to a distress for rent, between which and a distress *damage feasant* a difference is taken in the same

¹ Cited in *Gorton v. Falkner*, 4 T. R., at 568. — REPORTER.

² Gilb. Law of Distress, 45. — REPORTER.

BUCHNER v. C. M. AND N. W. RAILWAY.

page, many things being privileged from distress in the former case, that are not in the latter.

Lord KENYON, Ch. J. This distress cannot be supported. All the authorities upon this point are collected together in the notes in Hargr. Co. Lit. 47, and the clear result of them is that such a distress is illegal. If it were permitted to a party to distrain a horse, while any person is riding him, it would perpetually lead to a breach of the peace.

Per Curiam.

Judgment for the plaintiff.¹

demurrer sustained

Case 6. — **Buchner v. C., M. & N. W. Ry.**

^{Ch. J. M.}
**BUCHNER v. CHICAGO, MILWAUKEE AND
NORTHWESTERN RAILWAY.** *replevin*

SUPREME COURT OF WISCONSIN, 1884.

[60 Wis. 264.] 19 NW 56

APPEAL from the Circuit Court for Waukesha County.

The case is thus stated by Mr. Justice Cassoday:—

“During the times in question the plaintiff owned and occupied as a homestead a lot of about an acre and a half of land in the town of Waukesha, fronting northeasterly upon and extending to the centre of the South Milwaukee road, or Broadway,—such front being about 250 feet in extent, and the line of such front running in a northwesterly and southeasterly direction. The southeasterly side of said lot was upon the Prospect Hill road. In 1881 the defendant constructed its railroad track in nearly an east and west direction across said Broadway, at a point so near the northwesterly line of the plaintiff’s said lot, at the place of crossing, that the centre of the railroad track was eleven feet and

¹ See §§ 13-16, 53, 55, 66, 85-97.

Lord Mansfield was Chief Justice from Michaelmas Term, 30 Geo. II., Nov. 8, 1756, to Trinity Term, 28 Geo. III., June 4, 1788.

THE STUDY OF CASES.

the end of the ties seven feet northwesterly from the northwest corner of the plaintiff's said lot in the centre of said Broadway. In crossing said Broadway with said railroad track the defendant dug down and placed its track six feet below what was the former surface of said Broadway, and to restore said Broadway to its former usefulness it graded down the whole surface of that portion of said Broadway upon which the plaintiff's said lot so fronted, including the half to which the plaintiff had the legal title, from the surface at Prospect Hill road-crossing to a depth of five feet and eight inches below the former surface of the street at the plaintiff's northwest corner in the centre of said street. When such work and grading were nearly completed, the plaintiff filed a bill in equity to enforce the defendant to proceed and condemn that portion of his land constituting one half of said highway, upon which the defendant had so entered, cut down, and removed the dirt and graded down the same, and also to ascertain and recover the damages thereby sustained, and for an injunction until such damages were ascertained and paid. The court found, among other things, as a matter of fact, that the premises of the plaintiff had, by reason of such change of grade, been injured and depreciated in their market value to the extent of \$1,500; and, as a conclusion of law, that although the plaintiff would be entitled to recover such damages in a proper action, yet that he could not maintain that action; and hence dismissed the complaint with costs. The judgment entered thereon was affirmed by this court. See 56 Wis. 403, where the facts of that case are fully reported.

"Afterwards the plaintiff filed this petition for condemnation, alleging substantially the same facts as in the bill of complaint; and thereupon the time of the hearing was fixed, and due notice thereof was given to the defendant, which filed an answer to the petition, substantially admitting the facts stated, and alleging that it had not built or constructed

BUCHNER v. C. M. AND N. W. RAILWAY.

any of its line of road upon any portion of the plaintiff's land, and that the grading of the street on the front of the plaintiff's lot was in pursuance of the order and directions of the supervisors of the town. After a hearing the judge of the court, at chambers, by order appointed three commissioners therein, with the usual directions. The defendant excepted to the order and ruling of the court thereon. August 28, 1883, the defendant, in pursuance of notice, moved the court to vacate and set aside the order so made, but the motion was denied by the court; and from the order denying the same the defendant appealed."

For the appellant there was a brief by *Jenkins, Winkler & Smith*, and oral argument by *Mr. Jenkins*. They contended, *inter alia*, that the decision in the former case (56 Wis. 403) was merely that that action would not lie, whatever might be the rights of the plaintiff, and, that being decided in favor of the defendant, it was not pertinent to the issue to pass upon any other question involved, and neither party is concluded in any other respect by anything said in that opinion. *Hardy v. Mills*, 35 Wis. 149; *Woodgate v. Fleet*, 44 N. Y. 1-13; *Lathrop v. Knapp*, 37 Wis. 307; *Johnson v. N. W. N. Ins. Co.*, 39 id. 96. The cutting down of the highway was not a taking of property within the meaning of the Constitution. It was the simple performance of an act required by law to be done; it was done under authority of the supervisors of the town, who were authorized to change the grade in their discretion, and for such change if made by the town no action would lie by the plaintiff; it was done for the benefit of the public and not for the benefit of the company; by no proceedings could the company acquire any right in that highway; and until the legislature shall otherwise provide, an act so done for a public purpose under sanction of legislative authority, though causing incidental injury to property, is not the basis of an action. The case is not within sec. 1852, R. S., and the plaintiff could not

argument
for Ry Co

THE STUDY OF CASES.

take the initiative in condemnation proceedings. *Sherman v. M., L. S. & W. R'y Co.*, 40 Wis. 652 ; *Blesch v. C. & N. W. R'y Co.*, 43 id. 192 ; *Bohlman v. G. B. & L. P. R'y Co.*, 30 id., 108 ; *Carl v. S. & F. du L. R. R. Co.*, 46 id. 625.

For the respondent there was a brief signed by *Finches, Lynde & Miller*, attorneys, and *B. K. Miller, Jr.*, of counsel, and the cause was argued orally by *B. K. Miller, Jr.*

CASSODAY, J. The facts in this case are substantially the same as in *Buchner v. C., M. & N. W. R'y Co.*, 56 Wis. 403. We are informed by the learned counsel for the appellant that "this appeal is taken upon the assumption that most that was delivered in that opinion was merely *obiter*, unnecessary to the decision of that case, and not binding upon the parties, and much of it upon points not argued, and that Mr. Justice Lyon was [there] led into the expression of opinions which cannot be sustained upon reason or authority." The correctness of this assumption, of course, depends upon the record of that case, which speaks for itself.

It would seem that judges as well as lawyers, sometimes differ as to what may properly be regarded as *obiter dictum*. It is not infrequent, in courts of last resort composed of several judges, for all to come to the same conclusion, but from different views of the law, and hence it may at times be difficult to determine the precise principle upon which the case was decided, or what may properly be deemed mere *obiter*. "According to the more rigid rule," says Bouvier, "an expression of opinion, however deliberate, upon a question, however fully argued, if not essential to the disposition that was made of the case, may be regarded as a *dictum*." This seems to be the view of the learned counsel for the appellant. Under this "more rigid rule," it is believed that, comparatively, there are but few opinions in the books which contain no *obiter dictum*; that is, nothing which was not absolutely essential to the disposition made of the case. Under that rule what is here being written is nothing but

obiter dictum. But Bouvier adds that "it is, on the other hand, said that it is difficult to see why, in a philosophical point of view, the opinion of the court is not as persuasive on all the points which ~~was~~ ^{are} so involved in the cause that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point." Such *dictum*, if *dictum* it is, should, it would seem, be regarded as "*judicial dictum*," in contradistinction to mere *obiter dictum*, — that is, an expression originating with the judge alone, while passing, by the way, in writing his opinion, as an argument or illustration drawn from some collateral question. But even in that sense, we apprehend, there have been but few judges, occupying the bench for any considerable length of time, who have always been so precise and concise in their opinions as not to be subject to that criticism. As illustrations, we call to mind such expression of *obiter* by no less distinguished judges than Sir Matthew Hale, Lord Chief Justice Kenyon, and Lord Chief Justice Denman, as will appear by reference to the following cases: *Steel v. Houghton*, 1 H. Bl. 53; *Parton v. Williams*, 3 Barn. & Ald. 341; *Bast v. Byrne*, 51 Wis. 536. Besides, mere *obiter* is not always reprehensible. On the contrary, some of the most sacred canons of the common law had their origin in the mere *dicta* of some wise judges. To be valuable, however, they must of course be right.

But the opinion of the court in the former case cannot, we think, be regarded as merely the individual expressions of opinion of Mr. Justice Lyon upon collateral questions, while passing along in writing the opinion. Of course, an opinion of an appellate court, to be of any practical value to the trial court, must deal with the facts presented and the questions involved and discussed at the bar, even though some of them may only be indirectly involved in the determination of the main question upon which the case finally turns. On the trial of the equity suit brought by the plain-

THE STUDY OF CASES.

tiff against this defendant to enforce the condemnation in question, and for an injunction until the damages should be ascertained and paid, the trial court found, in effect, that by cutting down the street in front of the plaintiff's dwelling-house the defendant had injured and depreciated the market value of his premises to the extent of \$1,500, and, as a conclusion of law, that although the plaintiff *would be entitled to recover such damages in a proper action*, yet he could not maintain his bill in equity therefor; and hence dismissed the same with costs. The plaintiff appealed to this court, and of course the correctness of that adjudication was directly involved. The issues there presented, the findings of fact and conclusions of law, the points raised and discussed by counsel on both sides, are all fairly presented in the report of the case. Among the questions thus discussed by counsel *pro* and *con* were, in effect, these: Whether the plaintiff was the owner in fee of one half of the road-bed thus excavated and graded down; whether he had the right to protect the same for ordinary street purposes; whether he could be deprived of ingress and egress to and from the street to his dwelling-house without compensation; whether the construction and maintenance of the railroad at the point in question imposed a new burden or servitude upon the portion of the street belonging to the plaintiff; whether such excavation and removal of the earth was a taking of the plaintiff's property within the meaning of sec. 13, art. I, of the Constitution; whether the interest of the plaintiff in the highway was such as to require the defendant to condemn the same and pay for it prior to such taking; whether such condemnation could be enforced in equity by injunction.

Counsel for the defendant then sought to sustain that judgment upon two grounds, which were to the effect: (1) That the damages complained of were incidental merely, and not such as would entitle the plaintiff to recover in *any action*; (2) that assuming that he could recover in a proper

action, yet that his bill in equity was properly dismissed. This court determined the first proposition against the defendant, and the second in its favor. The complaint now is, in effect, that it was mere *obiter* to determine the first proposition by reason of the conclusion reached upon the second proposition. Upon the same theory it would have been mere *obiter* to say anything upon the second proposition, had we determined the first proposition the other way. To confine this court to the consideration of a single proposition, where several are involved and fully discussed by counsel, might at times operate to prolong litigation, increase the number of appeals, and inflict unnecessary burdens upon both parties and the public, and yet at times it may be highly proper. It will be observed that the judgment was affirmed upon the same theory upon which it was decided by the trial court, to wit, that although the plaintiff was entitled to recover in a proper action, yet by going into a court of equity he had misconceived his remedy. Counsel complain because the opinion is not confined to simply holding that the plaintiff could not maintain that action. But the ground of that decision was that the plaintiff had a perfect remedy at law. We agree with counsel that "it is not well, ordinarily, for courts to suggest remedies;" but, when counsel insist that a bill in equity must be dismissed because the plaintiff has a complete remedy at law, they are not in a very good position to complain, because, in deciding in their favor on the proposition suggested, the court referred to such remedy in unmistakable terms, instead of keeping it a profound secret, or referring to it in such vague and general terms as to mislead the other party. We do not hold that the finding of the court in the other case as to the amount of damages is *res adjudicata* in this case; nor that all that was said in that case is absolutely binding upon the parties and the court in this case; but simply that that opinion cannot fairly be treated as "merely *obiter*." So much in deference to the

THE STUDY OF CASES.

earnest argument of the able counsel for the defendant on the subject of *obiter*.

We are now to consider whether counsel was correct in claiming "that Mr. Justice Lyon was led into the expression of opinions which cannot be sustained upon reason or authority." It is conceded by all parties that the plaintiff's land extended to the centre of Broadway, subject to the public easement over the same as such highway. It must be conceded, for the purposes of this case, that the street in front of the plaintiff's premises had, long prior to the time in question, been taken for the purposes of a public highway. We moreover assume that adequate compensation for such taking for the use of a public highway, if required, was made at the time of such taking. This being so, it is undoubtedly true that the supervisors of the town, under their authority as such, had the right, for the purpose of improving the street, to enter upon the highway in question, and with ordinary care and skill to excavate, cut down, and lower the grade of the same, and for such change of grade by them for such a purpose the plaintiff would have been without remedy. This was settled in *Harrison v. Supervisors*, 51 Wis. 663, and cases there cited. But even the supervisors, for the purpose of improving the highway, have no right to extend an embankment or deposit earth outside of the limits of such highway without subjecting the town to additional liability. *Ibid*. Nor does it necessarily follow that even the supervisors of the town could make such excavation and change of grade as was made in the present case for the purpose of constructing a railroad. It is well settled in this State that the appropriation of a public highway for the purposes of a railroad is the imposition of an additional burden upon the abutting owners, and hence is the taking of private property for public use within the meaning of sec. 13, art. I. Const. *Ford v. C. & N. W. R. R. Co.*, 14 Wis. 609; *Pomeroy v. M. & C. R. R. Co.*, 16

Wis. 640; Hegar v. C. & N. W. R'y Co., 26 Wis. 624; Sherman v. M., L. S. & W. R. R. Co., 40 Wis. 645; Blesch v. C. & N. W. R'y Co., 43 Wis. 183. This being so, neither the legislature nor any municipality could authorize such taking without, at least, making provision for compensation therefor. *Ibid.* It follows that the defendant company would not have had the right to make the excavation and grading in question for the purposes of a railroad track and road-bed for the same without the consent of the abutting owners, and without condemnation and compensation therefor in the manner provided by the statute.

Had the company so constructed its road-bed and track in and upon said street, its liability for damages would not have been confined to the land occupied by the track, nor by the road-bed, nor even the track, road-bed, and necessary ditches, but would have covered all land rendered useless or destroyed for the ordinary purposes of a highway, or otherwise. Hegar v. C. & N. W. R'y Co., *supra*. But while the defendant did make the excavation and cut down and grade the street, yet it did not lay its track upon any portion of the plaintiff's land, nor any portion of the street in front of his premises, and had no purpose of doing so. Does the mere absence of the track, or any purpose of putting it there, deprive the plaintiff of any remedy for the excavation of his land and the removal of his soil? The authorities cited establish, beyond all controversy, that the plaintiff owned the soil to the centre of the street. It was his private property, subject only to the public easement. No one had any right to interfere with it, except for the purposes of travel, and the town or district authorities, for the purposes of improving it as a public highway. Any other interference was a trespass. Being private property, except for those purposes, neither the legislature nor the municipality could, without new and additional compensation, impose any new burden or servitude upon it, or authorize

THE STUDY OF CASES.

the excavation and removal of any portion of the plaintiff's land.

But it is claimed that the railroad company did not excavate and remove the plaintiff's soil and grade down the street in question for the purposes of the railroad, but only to restore the street, after the construction of its railroad across the same, to such condition that its usefulness should not be materially impaired, and that those things were done under the direction of the supervisors of the town. A railway company gets its life and authority from the statute, and only for the purposes named in the statute. Such a company has no vicarious power to act for and in behalf of the supervisors in changing the grade of a street, under the highway laws of the State. Whatever right it may have in that regard is imposed upon it as a condition of constructing its railroad. Its right to take private property for its use is only by virtue of its chartered rights, and then only for the purposes therein designated. Such taking must, therefore, necessarily be by the authority, in the manner, and for the purposes prescribed in the statute, and then it can only be authorized upon the condition of compensation or consent. A railway company cannot be a traveller upon a highway, nor a supervisor of a town, nor can it have imputed to it the rights or privileges of either. Its agents and employees may, but the company, as such, cannot. These things being so, as between the railway company and the abutting owners of a highway, the lands within the limits of the highway are private property. The taking of it by a railway company must, necessarily, be the taking of it for the use of the company. It has no right to take for any other use. Other uses, or uses by other parties, may grow out of or be incidental to such taking, but the taking, nevertheless, is by the railway company and for the railway company. The lands within the limits of such highway being, as between the abutting owners and the railway company,

private property, such company can have no additional rights by reason of the easement in favor of the public, nor by reason of the authority to change the grade existing in the town.

The defendant railway was expressly empowered, subject to the provisions of sec. 1836, R. S., "to construct its railroad across, along, or upon any highway; . . . to carry any highway . . . *over or under its track*, as" might "be most expedient for the public good; to change the course and direction of any highway, when made necessary or desirable to secure more easy ascent or descent by reason of any embankment or cut made in the construction of the railroad, *and take land necessary therefor*; provided, such highway or road be not so changed from its original course more than six rods, nor its distance thereby lengthened more than five rods." Subd. 5, sec. 1828, R. S. The conditions contained in sec. 1836, R. S., subject to which the above authority is given, provide, in effect, that such railway "*shall restore every . . . highway . . . across, along, or upon which such railroad may be constructed, to its former state, or to such condition as that its usefulness shall not be materially impaired, and thereafter maintain the same in such condition* against any effects in any manner produced by such railroad." Thus it appears that whenever the railway company constructs its railroad across, along, or upon a highway, it must not only restore the same to as good a condition of usefulness as it was in before, but must thereafter maintain the same in such restored condition. As it is impossible to restore without entering upon the land and doing the things necessary to restore, so it is impossible to maintain the same in such restored condition without preserving and continuing such condition of things, and from time to time re-entering and replacing or removing materials. Such continuing duty is coupled with a supposed permanent right, and necessarily imposes a new burden or servitude upon the abutting owner's

THE STUDY OF CASES.

private interest and property in the land constituting the highway. Besides, there is a possibility that the defendant may still further lower or elevate its track, which would necessitate further changes in order to restore the highway to a condition of usefulness.

But the right given to a railway company to construct its railroad across, along, or upon any highway, and to carry any highway over or under its track, as provided in sec. 1828, by restoring such highway, and then maintaining it in such restored condition, is given only subject to the further provisions of sec. 1836, that "when any lands shall be required in order to change any highway" in any of the methods named, then "the same may be condemned, taken, and compensation made" therefor "in the manner provided in" that chapter. True, in *Harrison v. Supervisors*, 51 Wis. 645, it is said that "the altering of a highway, within the meaning of such constitutional provision, clearly means an alteration of its course, and not a change of its grade." Page 658. That was the necessary result of holding that so long as the highway authorities kept within its limits, there was no taking within the constitutional provision. But here the statute is speaking of constructing a "railroad across, along, or upon a highway." Such construction is clearly a taking, within the meaning of the Constitution, in each of the cases named. No one would, we apprehend, claim that the clause of the statute, requiring condemnation and compensation, does not apply when the railroad is constructed "along or upon a highway," nor to so much of the street occupied by the railroad in crossing a highway. So it seems to us that it applies to that portion of the highway which the railway company, as a condition of constructing its railroad across, along, or upon a highway, is required to restore to its former condition of usefulness, and thereafter to maintain in that condition. This "change" of the highway necessitated by the construction of the railroad must, therefore,

be a taking within the meaning of the Constitution, and since it must thereafter be permanently maintained by the railway company, there must necessarily be condemnation and compensation.

Applying the statute to the facts of this particular case, it is the same as though the legislature had said in direct terms to the railway company: "You may cross Broadway at the point designated, and cut down and excavate the same, so that your track may be six or any other number of feet below the present surface of the street at that point, but you can do so only on condition that you cut down, excavate, and grade the whole of Broadway on a smooth inclined plane from the surface of Prospect Hill road to the level of such railroad track when constructed." So construing the statute, and it in effect declared that at the point designated the railway company should so construct its road-bed that the sides should have no greater incline or slope than existed in Broadway after it was so restored. Certainly the road-bed is not to be confined to the very land beneath the ties and rails, but to all that is essential in the construction and maintenance of the road-bed. *Hegar v. C. & N. W. R'y Co.*, 26 Wis. 624. Had the necessities of the case required the company to fill in and construct an embankment over the whole surface of Broadway, from Prospect Hill road to the railroad track, in order to construct the railroad, there would seem to be no doubt but what it would have constituted a part of the road-bed. The remote parts of such embankment would have been just as essentially a part of the road-bed as the portion directly under the rails or ties. Such remote parts would have been a taking within the meaning of the Constitution. *Harrison v. Supervisors*, 51 Wis. 645. To our minds, it was no less so because it was necessary to excavate instead of embank.

Leaving out of view the fact that the public had a right of easement over Broadway for the purposes of travel, and the

THE STUDY OF CASES.

further fact that the supervisors had the right to change the grade of the same to promote such purpose, and no one could, we apprehend, successfully maintain that such cutting down, excavation, and removal of the soil could be justified without condemnation of the land and compensation to the owners. And yet, as between such abutting owners and the railway company, in the matter of such cutting down, excavation, and removal of the soil, the existence of the highway in no respect figures, because, as against the railway company, it was private property.

The liability of the company is not limited to its absolute physical necessities, but is measured by its imperative *legal* necessities. If we are correct in the views taken, then what was done in changing the grade of Broadway was a necessary condition imposed by the statute on the company in constructing its railroad across the highway at so great a distance below the surface as it did, and hence was an essential part of the road-bed at that point. This being so, and the corporation having omitted to prosecute the same, and not having acquired title to the lands upon which that part of the road-bed had been constructed, it would seem to follow that the case is one where the party interested in the lands may institute and conduct the proceedings to a conclusion within the meaning of sec. 1852, R. S. This view of the facts and the statute seems to distinguish the cases cited by counsel as being in conflict with the opinion written by Mr. Justice Lyon in the former case.

By the Court. — The order of the Circuit Court is affirmed, and the cause is remanded for further proceedings according to law.¹

¹ See §§ 13-26, 48, 55-57, 91-92.

MILLER *v.* RACE.

Case 7. — Miller *v.* Race.

MILLER *v.* RACE.

KING'S BENCH, HILARY TERM, 31 GEO. II.

[1 *Burr.* 452.]

It was an action of trover against the defendant, upon a bank-note, for the payment of twenty-one pounds ten shillings to one William Finney, or bearer, on demand.

The cause came on to be tried before Lord Mansfield, at the sittings in Trinity Term last, at Guildhall, London; and upon the trial it appeared that William Finney, being possessed of this bank-note on the 11th of December, 1756, sent it by the general post, under cover, directed to one Bernard Odenharty, at Chipping Norton, in Oxfordshire; that on the same night the mail was robbed, and the bank-note in question (amongst other notes) taken and carried away by the robber; that this bank-note, on the 12th of the same December, came into the hands and possession of the plaintiff, for a full and valuable consideration, and in the usual course and way of his business, and without any notice or knowledge of this bank-note being taken out of the mail.

It was admitted and agreed that, in the common and known course of trade, bank-notes are paid by and received of the holder or possessor of them as cash; and that in the usual way of negotiating bank-notes, they pass from one person to another as cash, by delivery only, and without any further inquiry or evidence of title than what arises from the possession. It appeared that Mr. Finney, having notice of this robbery, on the 13th of December applied to the Bank of England "to stop the payment of this note;" which was ordered accordingly, upon Mr. Finney's entering into proper security "to indemnify the bank."

Some little time after this, the plaintiff applied to the bank for the payment of this note, and for that purpose delivered the note to the defendant, who is a clerk in the bank; but

the defendant refused either to pay the note or to redeliver it to the plaintiff. Upon which this action was brought against the defendant.

The jury found a verdict for the plaintiff and the sum of £21 10s. damages ; subject, nevertheless, to the opinion of this court upon this question, " Whether, under the circumstances of this case, the plaintiff had a sufficient property in this bank-note to entitle him to recover in the present action?"

Mr. *Williams*, was beginning on behalf of the plaintiff, —

But Lord Mansfield said, " That as the objection came from the side of the defendant, it was rather more proper for the defendant's counsel to state and urge their objection."

Sir *Richard Lloyd*, for the defendant.

The present action is brought, not for the money due upon the note, but for the note itself, the paper, the evidence of the debt. So that the right to the money is not the present question ; the note is only an evidence of the money's being due to him as bearer.

The note must either come to the plaintiff by assignment, or must be considered as if the bank gave a fresh, separate, and distinct note to each bearer. Now the plaintiff can have no right by the assignment of a robber. And the bank cannot be considered as giving a new note to each bearer ; though each bearer may be considered as having obtained from the bank a new promise.

I do not say whether the bank can or cannot stop payment ; that is another question. But the note is only an instrument of recovery.

Now, this note, or these goods (as I may call it), was the property of Mr. Finney, who paid in the money ; he is the real owner. It is like a medal which might entitle a man to payment of money, or to any other advantage. And it is by Mr. Finney's authority and request that Mr. Race detained it.

It may be objected "that this note is to be considered as cash in the usual course of trade." But still, the course of trade is not at all affected by the present question, about the right to the note. A different species of action must be brought for the note from what must be brought against the bank for the money. And this man has elected to bring trover for the note itself, as owner of the note, and not to bring his action against the bank for the money. In which action of trover property cannot be proved in the plaintiff, for a special proprietor can have no right against the true owner.

The cases that may affect the present are, 1 Salk. 126, M. 10, W. 3, Anonymous, *coram* Holt, Ch. J., at Nisi Prius, at Guildhall. There Lord Chief Justice Holt held, "That the right owner of a bank-bill, who lost it, might have trover against a stranger who found it; but not against the person to whom the finder transferred it for a valuable consideration by reason of the course of trade, which creates a property in the assignee or bearer," 1 Ld. Raym. 738; ¹ s. c., in which case the note was paid away in the course of trade; but this remains in the man's hands, and is not ² come into the course of trade. H. 12, W. 3, B. R. 1 Salk. 283, 284, Ford v. Hopkins, *per* Holt, Ch. J., at Nisi Prius at Guildhall. "If bank-notes, exchequer-notes, or million-lottery tickets, or the like, are stolen or lost, the owner has such an interest or property in them as to bring an action, into whatsoever hands they are come, money or cash is not to be distinguished; but these notes or bills are distinguishable, and cannot be reckoned as cash; and they have distinct marks and numbers on them." Therefore the true owner may seize these notes wherever he finds them, if not passed away in the course of trade.

¹ N. B. — In this case the transferee went to the bank, and got a new bill in his own name. However, the case turned upon his having the note for a valuable consideration. — REPORTER.

² The fact seems to be quite otherwise. — REPORTER.

THE STUDY OF CASES.

1 Strange, 505 ; H. 8, G. 1. In Middlesex, *coram* Pratt, Ch. J., *Armory v. Delamirie*,—a chimney-sweeper's boy found a jewel. It was ruled, "that the finder has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover."

This note is just like any other piece of property until passed away in the course of trade. And here the defendant acted as agent to the true owner.

Mr. *Williams, contra*, for the plaintiff.

The holder of this bank-note upon a valuable consideration has a right to it, even against the true owner.

1st. The circulation of these notes vests a property in the holder who comes to the possession of it upon a valuable consideration.

2dly. This is of vast consequence to trade and commerce ; and they would be greatly incommoded if it were otherwise.

3dly. This falls within the reason of a sale in market-overt ; and ought to be determined upon the same principle.

First. He put several cases where the usage, course, and convenience of trade made the law, and sometimes even against an Act of Parliament, 3 Keb. 444, *Stanley v. Ayles, per Hale*, Ch. J., at Guildhall ; 2 Strange, 1000, *Lumley v. Palmer* ; where a parol-acceptance of a bill of exchange was holden sufficient against the acceptor. 1 Salk. 23.

Secondly. This paper credit has been always, and with great reason, favored and encouraged. 2 Strange, 946, *Jenys v. Fowler et al.*

The usage of these notes is, "that they pass by delivery only ; and are considered as current cash ; and the possession always carries with it the property." 1 Salk. 126, pl. 5, is in point.

A particular mischief is rather to be permitted than a general inconvenience incurred. And Mr. Finney, who was robbed of this note, was guilty of some laches in not preventing it.

Upon Sir Richard Lloyd's argument, a holder of a note might suffer the loss of it for want of title against a true owner, even if there was a chasm in the transfer of it through one only out of 500 hands.

Thirdly. This is to be considered upon the same foot as a sale in market-overt.

2 Inst. 713. "A sale in market-overt binds those that had right."

But it is objected by Sir Richard, "that there is a substantial difference between a right to the note and a right to the money." But I say the right to the money will attract to it a right to the paper. Our right is not by assignment, but by law, by the usage and custom of trade. I do not contend that the robber, or even the finder, of a note has a right to the note; but after circulation, the holder upon a valuable consideration has a right.

We have a property in this note, and have recovered the value against the withholder of it. It is not material what action we could have brought against the bank.

Then he answered Sir Richard Lloyd's cases, and agreed that the true owner might pursue his property, where it came into the hands of another, without a valuable consideration, or not in the course of trade; which is all that Lord Chief Justice Holt said in 1 Salk. 284.

As to 1 Strange, 505, he agreed that the finder has the property against all but the rightful owner; not against him.

Sir *Richard Lloyd*, in reply:—

I agree that the holder of the note has a special property; but it does not follow that he can maintain trover for it against the true owner.

This is not only without, but against, the consent of the owner.

Supposing this note to be a sort of mercantile cash; yet it has an ear-mark by which it may be distinguished, therefore trover will lie for it. And so is the case of *Ford v. Hopkins*

THE STUDY OF CASES.

And you may recover a thing stolen from a merchant, as well as a thing stolen from another man. And this note is a mere piece of paper ; it may be as well stopped as any other sort of mercantile cash (as, for instance, a policy which has been stolen). And this has not been passed away in trade, but remains in the hands of the true owner. And therefore it does not signify in what manner they are passed away, when they are passed away ; for this was not passed away. Here the true owner, or his servant (which is the same thing), detains it. And surely robbery does not divest the property.

This is not like goods sold in market-overt ; nor does it pass in the way of a market-overt, nor is within the reason of a market-overt. Suppose it was a watch stolen ; the owner may seize it (though he finds it in a market-overt) before it is sold there. But there is no market-overt for bank-notes.

I deny the holder's (merely as holder) having a right to the note against the true owner ; and I deny that the possession gives a right to the note.

Upon this argument on Friday last, Lord Mansfield then said, that Sir Richard Lloyd had argued it so ingeniously that (though he had no doubt about the matter) it might be proper to look into the cases he had cited, in order to give a proper answer to them ; and therefore the court deferred giving their opinion to this day. But at the same time Lord Mansfield said he would not wish to have it understood in the city that the court had any doubt about the point.

LORD MANSFIELD now delivered the resolution of the court.

After stating the case at large, he declared that at the trial he had no sort of doubt but that this action was well brought, and would lie against the defendant in the present case, upon the general course of business and from the consequences to trade and commerce, which would be much incommoded by a contrary determination.

It has been very ingeniously argued by Sir Richard Lloyd for the defendant. But the whole fallacy of the argument turns upon comparing bank-notes to what they do not resemble, and what they ought not to be compared to; viz., to goods, or to securities, or documents for debts.

Now, they are not goods, not securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash.

They pass by a will which bequeaths all the testator's money or cash; and are never considered as securities for money, but as money itself. Upon Lord Ailesbury's will,¹ £900 in bank-notes was considered as cash. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes.

So on bankruptcies, they cannot be followed as identical and distinguishable from money, but are always considered as money or cash.

'Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said, "that the reason why money cannot be followed is, because it has no ear-mark;" but this is not true. The true reason is upon account of the currency of it; it cannot be recovered after it has passed in currency. So in case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration; but before money has passed in currency, an action may be brought for the money itself. There was a case in

¹ Popham *et al.* v. Bathurst *et al.*, in Chancery, 5th November, 1748. — REPORTER.

THE STUDY OF CASES.

1 G. 1, at the sittings, *Thomas v. Whip*, before Lord Macclesfield, which was an action upon assumpsit, by an administrator against the defendant for money had and received to his use. The defendant was nurse to the intestate during his sickness, and being alone, conveyed away the money. And Lord Macclesfield held that the action lay. Now this must be esteemed a finding at least.

Apply this to the case of a bank-note. An action may lie against the finder, it is true (and it is not at all denied); but not after it has been paid away in currency. And this point has been determined even in the infancy of bank-notes; for 1 Salk. 126, M. 10, W. 3, at *Nisi Prius*, is in point. And Lord Chief Justice Holt there says, that it is "by reason of the course of trade, which creates a property in the assignee, or bearer." (And "the bearer" is a more proper expression than assignee.)

Here an innkeeper took it, *bona fide*, in his business from a person who made the appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber; for this matter was strictly inquired and examined into at the trial; and is so stated in the case, "that he took it for a full and valuable consideration in the usual course of business." Indeed, if there had been any collusion, or any circumstances of unfair dealing, the case had been much otherwise. If it had been a note for £1,000 it might have been suspicious; but this was a small note, for £21 10s. only, and money given in exchange for it.

Another case cited was a loose note,¹ in 1 Ld. Raym. 738, ruled by Lord Chief Justice Holt, at Guildhall, in 1698, which proves nothing for the defendant's side of the question; but it is exactly agreeable to what is laid down by my Lord Chief Justice Holt in the case I have just mentioned. The action did not lie against the assignee of the bank-bill, because he had it for valuable consideration.

¹ *Ex relatione* of another person. — REPORTER.

In that case he had it from the person who found it; but the action did not lie against him, because he took it in the course of currency, and therefore it could not be followed in his hands. It never shall be followed into the hands of a person who *bona fide* took it in the course of currency and in the way of his business.

§ 27 The case of *Ford v. Hopkins* was also cited, which was in Hil. 12, W. 3, *coram* Holt, Ch. J., at Nisi Prius, at Guildhall, and was an action of trover for million-lottery tickets. But this must be a very incorrect report of that case; it is impossible that it can be a true representation of what Lord Chief Justice Holt said. It represents him as speaking of bank-notes, exchequer-notes, and million-lottery tickets as like to each other. Now, no two things can be more unlike to each other than a lottery-ticket and a bank-note. Lottery-tickets are identical and specific; specific actions lie for them. They may prove extremely unequal in value, — one may be a prize, another a blank. Land is not more specific than lottery-tickets are. It is there said, “that the delivery of the plaintiff’s tickets to the defendant, as that case was, was no change of property.” And most clearly it was no change of the property; so far the case is right. But it is here urged as a proof “that the true owner may follow a stolen bank-note, into what hands soever it shall come.”

1 *Salk* 283
(1700)

Now the whole of that case turns upon the throwing in bank-notes as being like to lottery-tickets.

But Lord Chief Justice Holt could never say “that an action would lie against the person who, for a valuable consideration, had received a bank-note which had been stolen or lost, and *bona fide* paid to him,” even though the action was brought by the true owner; because he had determined otherwise but two years before, and because bank-notes are not like lottery-tickets, but money.

The person who took down this case certainly misunderstood Lord Chief-Justice Holt, or mistook his reasons. For

THE STUDY OF CASES.

this reasoning would prove (if it was true, as the reporter represents it) that if a man paid to a goldsmith £500 in bank-notes, the goldsmith could never pay them away.

A bank-note is constantly and universally, both at home and abroad, treated as money, as cash, and paid and received as cash; and it is necessary, for the purposes of commerce, that their currency should be established and secured.

There was a case in the Court of Chancery,¹ on some of Mr. Child's notes, payable to the person to whom they were given, or bearer. The notes had been lost or destroyed many years. Mr. Child was ready to pay them to the widow and administratrix of the person to whom they were made payable, upon her giving bond, with two responsible sureties (as is the custom in such cases), to indemnify him against the bearer, if the notes should ever be demanded. The administratrix brought a bill, which was dismissed, because she either could not or would not give the security required. No dispute ought to be made with the bearer of a cash-note, in regard to commerce, and for the sake of the credit of these notes; though it may be both reasonable and customary to stay the payment till inquiry can be made whether the bearer of the note came by it fairly or not.

LORD MANSFIELD declared that the court were all of the same opinion for the plaintiff, and that Mr. Justice WILMOT concurred.

Rule, — *That the postea be delivered to the plaintiff.*²

¹ Walmesly against Child, 11 December, 1749. — REPORTER.

² See §§ 37, 41, 42, 58, 63, 98, 104, 105.

Case 8. — Gibbon v. Paynton.GIBBON *v.* PAYNTON *et alios.*

KING'S BENCH, EASTER TERM, 9 Geo. III.

[4 *Burr.* 2298.]

THIS was an action against the Birmingham stage-coachman, for £100 in money sent from Birmingham to London by his coach, and lost. It was hid in hay, in an old nail-bag. The bag and the hay arrived safe ; but the money was gone. The coachman had inserted an advertisement in a Birmingham newspaper, with a *nota bene*, "that the coachman would not be answerable for money or jewels or other valuable goods unless he had notice that it was money or jewels or valuable goods that was delivered to him to be carried." He had also distributed hand-bills, of the same import. It was notorious in that country, that the price of carrying money from Birmingham to London was three pence in the pound. The plaintiff was a dealer at Birmingham ; and had frequently sent goods thence. It was proved that he had been used, for a year and a half, to read the newspaper in which this advertisement was published ; though it could not be proved that he had ever actually read or seen the individual paper wherein it was inserted. A letter of the plaintiff's was also produced, from whence it manifestly appeared that he knew the course of this trade, and that money was not carried from that place to London at the common and ordinary price of the carriage of other goods : and it likewise appeared from this letter, that he was conscious that he could not recover, by reason of this concealment. The jury found a verdict for the defendant.

Mr. *Wallace*, on behalf of the plaintiff, moved (on Thursday, 26th January, 1769) for a new trial, and obtained a rule to show cause : which rule he now enforced, and was supported by Mr. *Hotham*.

They insisted that the coachman was answerable ; though he did not know that it was money. A carrier is always answerable, unless he accepts the goods specially ; but the circumstances of this case, they said, do not amount to a special acceptance. He made no inquiry or objection : therefore he is answerable. It is incumbent upon him to see that he is not cheated. He is bound to receive the goods, and must run the risk. If the goods are lost by negligence, or even if he is robbed, he is liable to answer for them. If the trader deceives him, he may have an action against the trader, for this deceit. In proof of their arguments and assertions, they cited the following cases.

Aleyn, 93 ; *Kenrig v. Eggleston*, 1 Vent. 238, a like case cited by Hale, in delivering the reasons of the resolution in the case of *Morse v. Slue* ; *Coggs v. Bernard*, in 1 Salk. 26, 3 Salk. 11, 268, and Holt, 13, 131, 528 ; *Carthew*, 485 ; Sir Joseph Tyly *et al. v. Morrice*, 2 Shower, 81 ; *Bastard v. Bastard*, 1 Stra. 145 ; *Titchburne v. White*, at Guildhall, where Lord Chief Justice King held "that if a box is delivered generally to a carrier, and he accepts it, he is answerable, though the party did not tell him there is money in it."

Mr. *Dunning* (Solicitor-General) and Mr. *Mansfield* argued on behalf of the defendant, against a new trial. They treated this conduct of the plaintiff as a fraud and deception upon the defendant. A carrier may accept specially : this man has done so. The advertisement is explicit against being answerable for money, without notice. This money was never fairly and properly intrusted to the defendant : and a carrier shall not be liable, where he is imposed upon ; which is the present case.

LORD MANSFIELD distinguished between the case of a common carrier, and that of a bailee. The latter is only obliged to keep the goods with as much diligence and caution as he would keep his own : but a common carrier, in respect of the premium he is to receive, runs the risk of them, and

must make good the loss, though it happen without any fault in him; the reward making him answerable for their safe delivery.

This action is brought against the defendant upon the foot of being a common carrier. His warranty and insurance is in respect of the reward he is to receive; and the reward ought to be proportionable to the risk. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security: and therefore he ought, in reason and justice, to have a greater reward. Consequently, if the owner of the goods has been guilty of a fraud upon the carrier, such fraud ought to excuse the carrier. And here the owner was guilty of a fraud upon him: the proof of it is over-abundant. The plaintiff is a dealer at Birmingham. The price of the carriage of money from thence is notorious in that place: it is the rule of every carrier there. It is fairly presumed that a man conversant in a trade knows the terms of it. Therefore the jury were in the right, in presuming that this man knew it. The advertisement and hand-bills were circumstances proper to be left to the jury. The plaintiff's having been used, for a year and a half, to read this newspaper is a strong circumstance for the jury to ground a presumption that he knew of the advertisement. Then his own letter strongly infers his consciousness of his own fraud, and that he meant to cheat the carrier of his hire. Therefore I entirely agree with the jury in their verdict. And if he has been guilty of a fraud, how can he recover? *Ex dolo malo non oritur actio.*

As to the cases cited: that of *Kenrig v. Eggleston*, in *Alleyn* 93, was £100 in a box delivered to a carrier; the plaintiff telling him only "that there was a book and tobacco in the box:" and Roll directed that although the plaintiff did tell him of some things in the box only, and not of the money, yet he must answer for it; for, he need not tell the

THE STUDY OF CASES.

carrier all the particulars in the box : but it must come on the carrier's part to make special acceptance. But in respect of the intended cheat to the carrier ; he told the jury they might consider him in damages : notwithstanding which, the jury gave £97 against the carrier for the money only, (the other things being of no considerable value), abating £3 only for carriage. *Quod durum videbatur circumstantibus*. Now, I own that I should have thought this a fraud : and I should have agreed in opinion with the *circumstantibus* ; which seems to have been also the opinion of the reporter.

So in the case cited by Hale, in 1 Ventris, 238, of a box brought to a carrier, with a great sum of money in it ; and upon the carrier's demanding of the owner "what was in it," he answered "that it was filled with silks and such like goods of mean value ;" upon which, the carrier took it, and was robbed ; and resolved "that he was liable." But (says the case) if the carrier had told the owner "that it was a dangerous time ; and if there were money in it, he durst not take charge of it ;" and the owner had answered as before ; this matter would have excused the carrier. In this case also, I own that I should have thought the carrier excused, although he had not expressly proposed a caution against being answerable for money : for, it was artfully concealed from him that there was any money in the box.

The case of Sir Joseph Tyly and others against Morrice, in Carthew, 485, was determined upon the true principles, — "that the carrier was liable only for what he was fairly told of." Two bags were delivered to him, sealed up, said to contain £200, and a receipt taken accordingly, with a promise "to deliver them to T. Davis ; he to pay 10s. per cent. for carriage and risk." The carrier was robbed. The Chief Justice was of opinion that he should answer for no more than £200 "because there was a particular undertaking by the carrier for the carriage of £200 only ; and his reward

was to extend no further than that sum ; and 't is the reward that makes the carrier answerable : and since the plaintiffs had taken this course to defraud the carrier of his reward, they had thereby barred themselves of that remedy which is founded only on the reward." So the jury were (in that case) directed to find for the defendant.

For these reasons, his Lordship was of opinion, in the present case, that the plaintiff ought not to recover.

Mr. Justice YATES held that a carrier may make a special acceptance ; and that this was a special acceptance.

By the general custom of the realm, a common carrier insures the goods, at all events ; and it is right and reasonable that he should do so : but he may make a special contract ; or he may refuse to contract, in extraordinary cases, but upon extraordinary terms. And certainly, the party undertaking ought to be apprised what it is that he undertakes : and then he will or at least may take proper care. But he ought not to be answerable where he is deceived. Here he was deceived. The money was hid in an old nail-bag ; and it was concealed from him that it was money. The plaintiff's own letter shows that he knew the course of this trade, and that money was not in that place carried at the common ordinary price of carrying other things. And if he was apprised of the defendant's advertisement, that might be equivalent to personal communication of the carrier's refusal to be answerable for money not notified to him : and this was left to the jury.

Mr. Justice ASTON, who tried the cause, said he had no doubt about the justice of the case : his difficulty had only arisen from the cases and authorities which had been now mentioned ; which put him upon more caution in admitting the evidence. But it appeared to be notorious in the country where this transaction happened, that the price of carrying money from thence to London was three pence in the pound : and it manifestly appeared that this was money sent under a

THE STUDY OF CASES.

concealment of its being money. The true principle of a carrier's being answerable is the reward. And a higher price ought, in conscience, to be paid him for the insurance of money, jewels, and valuable things, than for insuring common goods of small value. And here, though it was not directly and strictly brought home to the plaintiff that he had a clear certain knowledge of the defendant's advertisements and hand-bills, yet it was highly probable that he must have known of them: and his own letter showed his being conscious that he could not recover, by reason of the concealment. Therefore I think the verdict against him ought to stand.

Mr. Justice WILLES concurred in the same opinion.

Per Cur. unanimously —

*Rule discharged.*¹

Case 9. — *Tinkler v. Poole.*

TINKLER *v.* POOLE *et alios.*

KING'S BENCH, MICHAELMAS TERM, 11 Geo. III.

[5 *Burr.* 2657.]

THIS was an action of trover for goods seized by a custom-house officer. It was a parcel of herrings seized by him for not having satisfied the salt duty, and carried by him to the king's warehouse. It was agreed that they were not seizable: and the only question was "Whether this species of action lay against the officer, for seizing them and carrying them away."

Serjeant *Glynn*, for the plaintiff, argued that it did. The conversion, he said, was the substantial part of the action: the trover is fictitious. The defendant had no authority to take them. He took them wrongfully. He was a wrong-doer. He acquired a tortious property of them in himself.

¹ See §§ 35, 53, 66, 85-97.

Trover lies in similar causes. It lies against a sheriff, for the unlawful conversion of the goods of a bankrupt. 1 Burrow, 20 to 37, Cooper and Another, assignees of William Johns, a bankrupt, against Chitty and Blackiston, sheriffs of London. A tortious taking is in itself a conversion.

There is indeed a single *Nisi Prius* case reported in Bunbury 67 Mich. 1720, at Guildhall sittings after that term, before Lord Chief Baron Bury, *Etrick v.* an officer of the revenue. Upon an information of seizure of goods, there had been a verdict for the defendant : who afterwards brought trover against the officer for the goods. The Attorney-General objected, that trover did not lie for these goods (for that the seizure of them and putting them into the custom-house warehouse could not be said to be any conversion to his own use) ; but trespass, or trespass upon the case : and Mr. Attorney insisting upon a special verdict, and the Chief Baron inclining to be of that opinion, " That trover would not lie ; " the plaintiff chose to be nonsuited. But this is no solemn determination.

[Lord MANSFIELD said, Mr. Bunbury never meant that those cases should have been published : they are very loose notes.]

Mr. Justice WILLES mentioned another case in Bunbury pa. 80, Trin. 1721, *Israel v. Etheridge et al.*, where Baron Price said that it was now allowed and taken for law " That trover did not lie against an officer, for seizing *absque probabili causa* ; but trespass would." Baron Montague was of opinion " That neither trover nor trespass would lie ; because the seizure is not *contra pacem* : but that trespass upon the case, setting forth, that the seizure was *absque probabili causa*, would lie." Baron Page was of opinion " That trespass, or case for the consequential damages, will lie." •

Mr. *Dunning*, for the defendants, remarked upon the case last cited, that it appeared by it, that the three barons, Price,

THE STUDY OF CASES.

Montague, and Page, all concurred in the opinion "That trover would not lie."

LORD MANSFIELD. It is a very loose note. It makes Baron Montague say "That trespass would not lie."¹

MR. JUSTICE WILLES mentioned the case of *Kenicot v. Bogan*, in Yelverton, 198: which was trover and conversion of two tons of wine, taken for prisage.

LORD MANSFIELD, who tried the present cause, said he saved this point, upon the cases cited out of Bunbury, by the counsel for the defendants. But nothing is clearer, than "That trover lies." It is a wrongful conversion; let the property be in whom it will.

The case of *Chapman v. Lamb*, in 2 Strange, 943, was mentioned by Mr. Wallace; which was subsequent to the others, being in Michaelmas term 6 G. 2. It was trover against a custom-house officer for 14 shirts, a night-gown, and cap, seized for non-payment of duty; which were stated, negatively, "Not to be imported as merchandise." The

¹ As to the two cases in Bunbury, viz. *Etriche v. an officer of the revenue*, pa. 67, and *Israel v. Etheridge et al.*, pa. 82, in the third term after the former; I very strongly suspect them to be a continuation of the same case. The owner of the goods, finding that his action of trover met with so much opposition, chose to give it up; and seems to have immediately brought his action of trespass against the officers; which is the subject of the latter case. The names "Etriche" and "Etheridge" sound very nearly alike, to the ear; though they have less resemblance, to the eye, when written. The only difficulty is, that in the former case, Etriche seems to be the owner of the goods; in the latter, Etheridge and others seem to be the officers of the revenue. But this difficulty vanishes, upon the supposition that Mr. Bunbury's were loose and inaccurate notes, not intended for more than to refresh his own memory: for, no sort of inaccuracy is more frequent amongst note-takers, than an inattention to the precise names of the cases, and the transposing the names of the plaintiffs and defendants. Now, supposing such a transposition to have happened, in taking either of these two notes; the whole difficulty is at an end, and the apparent difference reconciled. — REPORTER.

FORWARD *v.* PITTARD.

plaintiff had judgment ; without any objection to its being an action of trover.

THE COURT ordered

*the postea be delivered to the plaintiff.*¹

Case 10. — Forward *v.* Pittard.

FORWARD *v.* PITTARD.

KING'S BENCH, MICHAELMAS TERM, 26 GEO. III.

[1 *T. R.* 27.]

THIS was an action on the case against the defendant as a common carrier, for not safely carrying and delivering the plaintiff's goods. This action was tried at the last Summer Assizes at Dorchester, before Mr. Baron Perryn, when the jury found a verdict for the plaintiff, subject to the opinion of the court on the following case : —

“That the defendant was a common carrier from London to Shaftsbury. That on Thursday, the 14th of October, 1784, the plaintiff delivered to him on Weyhill 12 pockets of hops to be carried by him to Andover, and to be by him forwarded to Shaftsbury by his public road wagon, which travels from London through Andover to Shaftsbury. That, by the course of travelling, such wagon was not to leave Andover till the Saturday evening following. That in the night of the following day after the delivery of the hops, a fire broke out in a booth at the distance of 100 yards from the booth in which the defendant had deposited the hops, which burnt for some time with unextinguishable violence, and during that time communicated itself to the said booth in which the defendant had deposited the hops, and entirely consumed them without any actual negligence in the defendant. That the fire was not occasioned by lightning.”

¹ See §§ 39, 44, 63.

Mr. Wallace appears to have been *amicus curiæ*.

THE STUDY OF CASES.

N. Bond, for the plaintiff. The question is, whether a carrier is liable for the loss of goods occasioned by fire, without any negligence in him or his servants. The general proposition is, that a carrier is liable in all cases, except the loss be occasioned by the act of God, or the King's enemies. Lord Raymond, 909; 1 Wils. 281. And this doctrine has lately been recognized by this court, in the case of the Company of the Trent Navigation *v. Wood, East.*, 25 Geo. 3, B. R. The only doubt is on the construction of the words "the act of God." It is an effect immediately produced without the interposition of any human cause. In *Amies and Stephens*, 1 Stra. 128, these words were held to include the case of a ship being lost by tempest. In the books under the head of "waste," there is an analogous distinction to be found: if a house fall down by tempest, or be burned by lightning, it is no waste; but burning by negligence or mischance is waste. Co. Litt. 53, a, b.

Before the 6th of Anne, 6 Ann. c. 31; 19 Ann. c. 14, an action lay against any person in whose house a fire accidentally began: this shows that an accidental fire was not in law considered as the act of God; but the person was punishable for negligence. Suppose a fire happens in a house where there are different lodgers, each of whose lodgings is considered as a separate house: if the fire be communicated from one lodging to another, and the court say the first fire was the act of man, at what time will it be said that it ceases to be the act of man and commences to be the act of God? If it were not the act of man in the first house, it is impossible to draw the line. In the case of the Company of the Trent Navigation and Wood, Lord Mansfield said, "By the act of God is meant a natural, not merely an inevitable, accident."

If it be contended for the defendant, that it is here stated that there was no actual negligence, that will not serve him; for this action was not founded in negligence. Lord Holt

says, there are several species of bailments, and different degrees of liability annexed to each ; and a carrier is that kind of bailee who is answerable though there be no actual negligence.

Borough, for the defendant, observed that the point in this case was not before the court in any of the cases cited. The general question here is, whether a carrier is compellable to make satisfaction for goods delivered to him to carry, and destroyed by mere accident, in a case where negligence is so far from being imputed to him, that it is expressly negatived? This action of assumpsit must be considered as an action founded on what is called the custom of the realm relating to carriers. And from a review of all the cases on this subject it manifestly appears that a carrier is only liable for damage and loss occasioned by the acts or negligence of himself and servants, that is, for such damage and loss only as human care or foresight can prevent ; and that there is no implied contract between him and his employers to indemnify them against unavoidable accidents. The law with respect to land carriers and water carriers is the same. *Rich v. Kneeland*, Cro. Jac. 330; *Hob.* 17 ; 5 *Burr.* 2827.

In *Vid.* 27 : The declaration, in an action against a waterman for negligently keeping his goods states the custom relative to carriers thus, "absque subtractione, amissione, seu spoliatione, portare tenentur, ita quod pro defectu dictorum communium portatorum seu servientium suorum, hujusmodi bona et catalla eis sic ut preferatur deliberata, non sint perdita, amissa, seu spoliata." It then states the breach, that the defendant had not delivered them, and "pro defectu bonæ custodiæ ipsius defendantis et servientium suorum perdita et amissa fuerunt." In *Brownl. Red.* 12, the breach in a declaration against a carrier is, "defendens tam negligenter et improvide custodivit et carriavit, &c." In *Clift.* 38, 39 ; *Mod. Intr.* 91, 92 ; and *Herne* 76, the entries are to the same effect. In *Rich and Kneeland*, *Hob.* 17,

THE STUDY OF CASES.

the custom is stated in a similar way ; and in the Exchequer Chamber it was resolved, "that though it was laid as a custom of the realm, yet indeed it is common law." On considering these cases, it is not true that "the act of God, and of the King's enemies" is an exception from the law. For an exception is always of something comprehended within the rule, and therefore excepted out of it ; but the act of God and of the King's enemies is not within the law as laid down in the books cited.

All the authorities cited by the counsel for the plaintiff are founded on the *dictum* in *Coggs v. Bernard*, 2 Lord Raymond, 909, where this doctrine was first laid down : but Lord Holt did not mean to state the proposition in the sense in which it has been contended he did state it. He did not intend to say, that cases falling within the reason of what are vulgarly called "acts of God" should not also be good defences for a carrier. After saying (Lord Raymond, 918), "the law charges the persons thus intrusted to carry goods against all events, but the acts of God and of the enemies of the King," he proceeds thus, "for though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing ; for else these carriers might have an opportunity of undoing all persons who had any dealings with them, by combining with thieves, &c. and yet doing it in such a clandestine manner, as would not be possible to be discovered." As Lord Holt therefore states the responsibility of carriers in case of robbery to take its origin from a ground of policy, he could not mean to say, that a carrier was also liable in cases of accident, where neither combination or negligence can possibly exist.

It appears from the Doctor and Student, Dial. 2, c, 38,

p. 270., that, at the time that book was written, the carrier was held liable for robberies which diligence and foresight might prevent. And what is there said agrees precisely with the custom; and does not bear hard on the carrier. If he will travel by night, and is robbed, he has no remedy against the hundred; for then he is not protected by the statute of Winton, and he ought to be answerable to the employer. If he travel by day, and is robbed, he has a remedy. Now the carrier may not perhaps be worth suing; and the employer may bring the action against the hundred in his own name; which action he would be deprived of, if the carrier travelled by night.

There is not a single authority in all the old books which says that a carrier is responsible for mere accidents. He only engages against subtraction, spoil, and loss, occasioned by the neglect of himself or his servants. These words plainly point at acts to be done, and omission of care and diligence. But in the present case there is no act done; and there cannot be said to be any omission of care and diligence, since they could not have prevented the calamity.

Lord Holt, in *Coggs v. Bernard*, seems to have traced, with great attention, the different species of bailments. He cites many passages from Bracton, who has nearly copied them from Justinian. So that it is probable that the custom relating to carriers took its origin from the civil law as to bailments. Now it is observable that in no one case of bailment is the bailee answerable for an accident; he is only liable for want of diligence. The only difference in this respect between the civil and the English law is, that the former, Justin. lib. 3. 15, S. 2, 3, 4, Tit. 35, S. 5, distinguishes between the different degrees of diligence required in the different species of bailment; which the latter does not.

In all the cases to be found in our books, may be traced the true ground of liability, negligence. If the law were not as

is now contended for, the question of negligence could never have arisen; and the case of robbery could not have borne any argument; whereas the case of *Mors v. Slue*, 1 Vent. 190, 238, came on repeatedly before the court, and created very considerable doubts.

In the case of *Dale v. Hall*, 1 Wils. 281, and the Proprietors of the Trent Navigation *v. Wood*, there were clear facts of negligence. In the first, the rats gnawed a hole in the hoy, which undoubtedly might have been prevented. And in the other, each of the judges, in giving his opinion, said there was negligence.

In the Year Books, 22 Ass. 41, there is a case of an action against a waterman for overloading his boat so that the plaintiff's horse was drowned. This case is recognized in *Williams v. Lloyd*, S. W. Jones, 180, where it is said, "It was there agreed that if he had not surcharged the boat, although the horse was drowned, no action lies, notwithstanding the assumpsit: but if he surcharge the boat, otherwise; for there is default and negligence in the party." The court in 22 Ass. 41, said, "It seems that you trespassed when you surcharged the boat, by which the horse perished." The same case is to be found in 1 Ro. Abr. 10, pl. 18; Bro. Tit. Action sur le Case, 78. And it is also recognized in *Williams v. Hide and Ux.* Palm. 548.

In Winch. 26: To an action against a carrier, there is a special plea that the inn in which the goods were deposited was burned by fire, and that the plaintiff's goods were at the same time destroyed, without the default or neglect of the defendant or his servants. To this the plaintiff demurred, not generally but specially, "that the plea amounted to the general issue."

In all actions founded in negligence, the negligence is alleged and tried, as a fact; as in actions against a farrier, smith, coachman, &c. It is the constant course in such actions to leave the question of negligence to the jury. It

appears in *Dalston v. Janson*, 5 Mod. 90, that the defendant formerly used to plead particularly to the neglect. In 43 Edw. 3, 33; Clerk's Assist. 99; Mod. Intr. 95; and Brown. Red. 101, which were actions founded in negligence, the negligence is traversed. Now a traverse can be only of matter of fact. And here negligence is expressly negated by the case.

However, if the court should be of opinion, that the carrier is answerable for every loss, unless occasioned by the act of God, or the King's enemies, he then contended that, as the act of God was a good ground of defence, this accident, though not within the words, was within the reason, of that ground. It cannot be said that misfortunes occasioned by lightning, rain, wind, &c. are the immediate acts of the Almighty; they are permitted but not directed by him. The reason why these accidents are not held to charge a carrier is, that they are not under the control of the contracting party; and therefore cannot affect the contract, inasmuch as he engages only against those events which by possibility he may prevent. Lord Bacon, in his Law Tracts, commenting on this maxim, Reg. 5, *necessitas inducit privilegium quoad jura privata*, says, "The law charges no man with default where the act is compulsory and not voluntary, and where there is not a consent and election; therefore, if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason as in presumption of law man's nature cannot overcome, such necessity carrieth a privilege in itself." Necessity, he says, is of three sorts, and under the third, he adds, "If a fire be taken in a street I may justify pulling down the walls or house of another man to save the row from the spreading of the fire." Now in the present case, if any person, in order to stop the progress of the flames, had insisted on pulling down the booth wherein the hops were deposited, and in doing this the hops had been damaged, the carrier would not have been liable to

THE STUDY OF CASES.

make good such damage ; for it would have been unlawful for him to have prevented the pulling down the booth.

It is expressly found in the present case, that the fire burnt with unextinguishable violence. The breaking out of the fire was an event which God only could foresee. And the course it would take was as little to be discovered by human penetration.

Bond in reply. There are several strong cases where there could not be any negligence. It is not sufficient in these cases to negative any negligence ; for every thing is negligence which the law does not excuse. 1 Wils. 282. And the question here is, is this a case which the law does excuse? In *Goffe v. Clinkard* (cited in Wils. 282) there was all possible care on the part of the defendants. The judgment in the case of 4 Burr. 2298, *Gibbon v. Peyton* and another, which was an action against a stage-coachman for not delivering money sent, is extremely strong : there Lord Mansfield said, 4 Burr. 2300, "A common carrier, in respect of the premium he is to receive, runs the risk of them, and must make good the loss, though it happen without any fault in him ; the reward making him answerable for their safe delivery."

That a carrier was liable in the case of a robbery was first held in 9 Ed. 4. pl. 40.

A bailee only engages to take care of his goods as his own, and is not answerable for a robbery ; but a carrier insures. 1 Ventr. 190, 238 ; Sir T. Raym. 220, s. c. ; 1 Mod. 85.

In *Barclay and Heygena*, E. 24 G. 3. B. R., which was an action against a master of a ship to recover the value of some goods put on board his ship in order to be carried to St. Sebastian ; it was proved that an irresistible force broke into the ship in the river Thames, and stole the goods ; yet the defendant was held answerable. In *Sutton and Mitchel*, at the sittings at Guildhall after Tr. 25 G. 3 ; *vide* 1 T. R. 18, the question was not disputed as far as to the value of the ship and freight.

There is no distinction between that case and a land carrier. And there can be no hardship in the court's determining in favor of the plaintiff; for when the law is once known and established, the parties may contract according to the terms which it prescribes.

As to negligence being a matter of fact; that is answered by the decision in the Company of the Trent Navigation against Wood.

Lord MANSFIELD. There is a nicety of distinction between the act of God and inevitable necessity. In these cases actual negligence is not necessary to support the action.

Cur. adv. vult.

Afterwards Lord MANSFIELD delivered the unanimous opinion of the court.

After stating the case — The question is, whether the common carrier is liable in this case of fire? It appears from all the cases for 100 years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man: for every thing is the act of God that happens by his permission; every thing, by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the King's enemies or by such act as could not happen by the intervention of man, as storms, lightning, and tempests.

If an armed force come to rob the carrier of the goods, he is liable; and a reason is given in the books, which is a bad

THE STUDY OF CASES.

one, viz. that he ought to have a sufficient force to repel it ; but that would be impossible in some cases, as for instance in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil.

In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man ; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident.

*Judgment for the Plaintiff.*¹

Case 11. — Burke v. Jones.

BURKE v. JONES.

CHANCERY, 1813.

[2 Ves. & B. 275.]

UNDER a decree directing the usual accounts of the personal estate, debts, etc., of the testator, Andrew Robinson Bowes, the Master's report stated that the testator was, on the 16th of June, 1787, committed to the King's Bench Prison on the prosecution of the king, and continued in such custody under the said commitment and subsequent detainers of creditors until his death, on the 16th of January, 1810 : that by his will, dated the 12th of April, 1809, he gave to trustees, their executors, etc., all his ready money, etc., personal estate, and effects ; upon trust, as soon as might be to convert the same into money, and thereout to pay, discharge, and satisfy, so far as the same would extend, all his just debts, funeral expenses, and legacies ; and the residue (if any) he gave to his son, William Johnstone Bowes. The testator also devised all his messuages, lands, etc., to the use of the same trustees, their heirs and assigns ; upon trust,

¹ See §§ 35, 42, 126-127.

by sale or mortgage to raise such sums as should be necessary to pay such of his debts, funeral and testamentary expenses and legacies, which the moneys to arise from his personal estate should not be sufficient to pay ; which sums the trustees were directed to apply and dispose of in payment and discharge of his said debts, etc., which his personal estate should not be sufficient to satisfy.

The Master farther stated that no action or other proceeding was ever brought on any of the debts in the schedule to his report ; that no promise to pay the same was ever made by the testator after the statute of 21 James 1, c. 16, had barred them ; and that all the said debts were barred by the statute at the death of the testator : but though it had been insisted before him that, as the testator was a prisoner in the King's Bench during the time aforesaid, all proceedings against him would have been fruitless, and that as he had by his will created a trust for the payment of his debts, all the said debts were thereby revived and taken out of the statute, he refused to permit the creditors contained in the schedule to prove.

To this report the creditors took an exception, contending,
1st. That a devise in trust to pay debts will revive debts barred by the Statute of Limitations. Anon., Salk., 1 Salk. 154 ; Andrews v. Brown, Prec. Ch. 385, 2 Eq. Ca. Ab. 579 ; Blakeway v. Earl of Strafford, 2 P. Wms. 373, 6 Bro. P. C. 630, ed. 2 ; Staggers v. Welby, cited 2 P. Wms. 374 ; Jones v. Earl of Strafford, 3 P. Wms. 79 ; Lacon v. Briggs, 3 Atk. 107 ; Oughterloney v. Earl Powis, Amb. 231 ; Executors of Fergus v. Gore, 1 Sch. & Lef. 107 ; *Ex parte* Dewdney, *Ex parte* Seaman, 15 Ves. 477. See 497.

2dly. That under the particular circumstances of this case these creditors ought to have been permitted to prove.

Mr. Richards, Mr. Wetherell, and Mr. Shadwell, for the parties interested in the estate.

Mr. Horne, for the trustees.

Though the general question, whether a devise in trust to pay debts revives a debt barred by the Statute of Limitations, has been noticed in many cases, this is the first time it has called for decision. It is clear that the testator might have pleaded the Statute of Limitations; and it must be admitted that if the personal estate is sufficient to pay the debts, the executor or administrator may insist on the statute as well in the Master's office as in an action at law. A direction to pay debts cannot let in a creditor on the personal estate where that is the only fund; and there is no reason why the introduction of real estate into the devise should make any difference. In the anonymous case in *Salkeld* the circumstances do not appear; nor is the abstract proposition there stated merely as a *dictum* the law of this court. *Andrews v. Brown* is no decision of this point. *Blakeway v. the Earl of Strafford*, on a devise to executors, is very briefly stated, and on the face of it bears strong marks of inaccuracy. The debt was not barred; the payment of £50 in part having taken place within six years before the testator's death. Whatever might have been the weight of that decision, the House of Lords afterwards overruled it, reversing the original decree, and ordering the plea to stand for an answer, with very special directions (see Mr. Cox's note, 2 P. Wms. 375); and after that decision there is no farther account of the case. In *Lacon v. Briggs*, Lord Hardwicke's opinion is inconsistent with what he said in *Oughterloney v. Earl Powis*. The executors of *Fergus v. Gore*, and *Ex parte Dewdney* are strong authorities against this claim; and Lord Kenyon, Lord Alvanley, Lord Redesdale, and Lord Eldon have at different times questioned the existence of any such rule, that a devise to pay debts will take debts out of the Statute of Limitations. Though the decision of *Jones v. Earl of Strafford* affects to follow *Blakeway v. Earl of Strafford*, the cases differ widely: the former having no such payment within six years, as the latter, nor any circumstance taking it out of the

statute. In *Gofton v. Mill*, 2 Vern. 141, Pre. Ch. 9, the will expressly recognized the debt, though the testator mistook its amount. *Legastick v. Cowne*, Mos. 391, is a direct decision of the point by Lord Macclesfield against this exception.

The VICE-CHANCELLOR. The question upon this exception is, whether by this will first giving the personal estate in trust for the payment of debts, and if that should be insufficient, creating an auxiliary fund by the real estate, revived a simple contract debt upon which the Statute of Limitations had operated before the testator's death; which can be revived only by the effect of these clauses in the will; having never been revived by any promise during the testator's life; and this being a naked case, stripped of any circumstances showing either that he had at any time recognized these debts, or affording a presumption of payment. The question, therefore, now comes for determination, generally, what in all cases shall be the effect of a devise of real estate subject to the payment of debts; that question arising upon debts completely barred before the testator's death; and the time in no instance unexpired, and running at the time of the testator's death; but the statute having taken complete effect upon all these debts, and on some probably more than twenty years.

It is not necessary to consider the effect of a simple direction to pay the debts out of the personal property, and the argument was properly confined to the effect of the devise of the real estate; which is not liable to simple contract debts, otherwise than by the will.¹ It was contended that if the testator creates a trust of real estate for the payment of his debts, without any particular reference to debts barred by the statute, the rule is universal that all debts standing in that predicament are revived, whatever may be the amount, duration, or other circumstances; that the devise is to be considered

¹ Now by statute 47 Geo. 3, c. 74, the real estates of traders are assets for debts by simple contract. — REPORTER.

THE STUDY OF CASES.

either as a waiver of the statute or as an acknowledgment that such debts existed and were unpaid.

This is certainly a case of very great importance, as it must establish a general rule upon the effect of this very common clause in a will ; and it is singular that this should still remain *vexata quæstio* as to the rule of this court, and the inference of the intention in creating such a trust, upon which it must depend. The argument was properly founded entirely on authority ; as it is difficult upon principle to conceive that the testator could intend to prescribe to his executors any rule either in admitting or rejecting debts, or to recognize any particular debt as one which had existed and still remained unpaid ; nor is it easy to infer that the creation of a fund for the payment of his just debts can have any operation upon the inquiry, what are his debts, or the mode in which that inquiry is to be prosecuted : but this was represented as a fixed, invariable rule, not yielding to principle, and too firmly established to admit of exceptions.

No case has been cited within the period of half a century in which such a rule is stated as existing, except for the purpose of complaining of it. It was justly observed that those complaints are a recognition of the rule by very high authorities ; and there is certainly considerable authority for concluding that such a rule has been understood as prevailing ; that a devise of real estate for the payment of debts would let in debts barred by the Statute of Limitations. It must, however, be remembered that the last time it appears in print, in the case of *Oughterloney v. Earl Powis*, Amb. 231, Lord Hardwicke did not consider it so established that it should be acted upon without consideration, expressing surprise how such a rule could be established. It has received the decided disapprobation of Lord Kenyon and Lord Alvanley ; and it is impossible to read the judgment in *Ex parte Dewdney*, 15 Ves. 477 ; see p. 497, without perceiving the Lord Chancellor's disapprobation of such rule. To

the floating notion, which has certainly prevailed for a great length of time, countenanced by high authorities, that there is such a rule, must be opposed those authorities I have mentioned ; to which may be added the declaration of a judge very conversant with the law and practice of this court, that there is no such rule as to debts positively barred ; distinguishing the case where the time having commenced the death occurs before it has run out, and then the trust would keep it alive.

I have paused upon this case, not from any doubt of the principle, but that I might have an opportunity of communicating with Lord Redesdale, and collecting all the information that could be obtained upon a question of such magnitude, involving a general rule of great importance upon a subject that must very frequently occur ; that it may be settled and publicly known if this clause is to have the effect that has been supposed ; or if not, that such a notion as to its operation may no longer remain afloat. With this view I have given the question all possible attention ; I have spared no pains in collecting every case in print, or that I could hear of, bearing upon it ; I have traced the history of this supposed rule to its foundation, and have examined to the bottom the authorities on which it has been supported, many in number, and some not very correctly reported, which I have compared with the register's book. I shall go through those authorities. The result is that, though there are many *dicta*, there is not one case the facts of which are distinctly stated, deciding that a debt actually barred by the statute is revived merely by virtue of this clause either as to personal or real estate ; and as to the former, it has not been argued. In almost all the cases there was a recognition of the very debt, either express or by fair inference ; or the death occurred before the statute had actually attached ; and then, according to Lord Redesdale's opinion, a trust being created for creditors, the statute cannot attach ; and the lapse of time forms no bar.

THE STUDY OF CASES.

The earliest case upon this subject is *Gofton v. Mill*, Pr. Ch. 9 ; 2 Vern. 141, which is best reported in *Precedents in Chancery*. It does not appear that the statute was pleaded ; and the very debt was recognized by the will, with some difference as to the amount. That case therefore amounts to nothing, and was not much relied upon.

In *Salkeld* (1 Salk. 154) an anonymous case is referred to, supposed to have been decided by Lord Cowper, stating very fully a principle that would justify the argument that has been urged ; that if one by will or deed subjects his lands to the payment of his debts, debts barred by the Statute of Limitations shall be paid, for they are debts in equity ; and the duty remains ; the statute has not extinguished that, though it hath taken away the remedy.

I have examined, but can find no trace of this case in the register's book. The note states no facts or circumstances, but mere general propositions, in one of which as to interest beyond the penalty of a bond it is certainly incorrect, being in opposition to repeated decisions. That case seems to be confounded, but does not correspond in date, with *Staggers v. Welby*, decided by the Master of the Rolls, and not in print, except as it is referred to in *Blakeway v. The Earl of Strafford*, 2 P. Wms. 373 ; and the circumstances which I have taken from the register's book, so far from forming the foundation of this doctrine, do not in any manner warrant such a rule. Sir Richard Earle, having in 1695 entered into a contract with the plaintiff, a builder, died in 1697, before the work had proceeded far, when the debt could not have been more than two years old, having by his will charged his real estate with the payment of his debts. That charge creating a trust for the creditors when the time had commenced, but before the statute could operate, was clearly within Lord Redesdale's principle : besides that, the defendant Welby, who was the executor and devisee, is stated in the bill to have directed the work to proceed, and to have communi-

cated with, and promised payment to, the plaintiff; and when they differed, two surveyors were employed to ascertain the amount; and Welby complained of not having an allowance for timber furnished by the testator and by himself. The surveyors ascertained the amount at £752; and in 1713 Welby died, having by his will subjected the same estate to his own debt and Sir Richard Earle's. The bill praying an account, the executrix admitted the contract and the circumstances I have stated; and the estimate of the surveyors was found, the complaint of Welby in his own handwriting; and then the executor insisted upon the statute, and upon an allowance in respect of those items which had not been allowed, as she contended they ought to have been, by the plaintiff; and she filed a cross bill for a discovery.

Under these circumstances could a plea of the statute be allowed? The debt was not barred, and had it been barred the conduct of the executrix would have revived it; yet this is the case represented in *Blakeway v. The Earl of Strafford* as laying the foundation of this doctrine.

There is a case (*Andrews v. Brown*, Pre. Ch. 358) in 1714, previous to *Staggers v. Welby*, containing *dicta* that go the full length of this argument, and farther: viz., that wherever personal property is given, or there is any written declaration that the debts shall be paid, independent of the will, it shall have this effect; but the facts by no means warrant that conclusion. Upon them, without straining to consider the party as advertising for, and expressly inviting debts that were barred, there is a fair acknowledgment of those outstanding debts. The debtor was a fugitive bankrupt. It does not appear that the defendant insisted on the statute: but if he had, the advertisement to all the creditors, all being in the same predicament, must be taken as an invitation and engagement to the creditors to whom it was addressed; and considering how little is sufficient to revive a debt barred by

THE STUDY OF CASES.

the statute, that might have been deemed sufficient as an express recognition of the debts that had been barred.

The case of *Blakeway v. The Earl of Strafford*, 2 P. Wms. 373, which was carried to the House of Lords, is a very important authority ; and the date is material. Considering the facts of that case, it is extraordinary how such a decision as Lord King's could have been made. How could the statute be pleaded, a trust having been created when the debt was clearly existing. The trustees were trustees for that creditor, upon trust to pay that debt. The decision of the House of Lords reversing Lord King's decree is extremely strong ; saving the benefit of the plea to the hearing, which, if the mere circumstance of making the will would be an answer to the statute, ought to have been overruled. The effect of the decree with that variation is, that if the party failed in making out the special acknowledgment the will alone would not be an effectual answer to the statute.

This is the fair inference from the decision of the House of Lords ; but four years afterwards another case came under the consideration of Lord King, who, aware, as he must have been, of the ground of that reversal, states the principle that governed the House of Lords, — that a plea of the statute is good if there is nothing but a will creating a trust for debts. This case (*Le Gastick v. Cowne*, Mos. 391) is a most material authority ; the allowance of the plea being a direct decision of the point by Lord King, who first decided *Blake-way v. the Earl of Strafford*, and knew the result of that case : stating his knowledge that the Lords were of a different opinion from Lord Cowper ; and grounded upon that knowledge his own opinion that generally a trust of real estate by will for the payment of debts will not of itself operate as an answer to the statute. It is, however, proper to observe that in the Register's book (11th July, 1737, Reg. Lib. B.) an important fact appears which might make a material difference. The debt was contracted in the beginning of 1707, and the

testator died in May, 1712, before the six years had elapsed ; consequently it is open to the observation that the devise was interposed before the six years elapsed. The defendant pleading the statute negatives a demand within six years ; and Lord King, taking the question up generally, as upon the statute and the will, decides without adverting to those special circumstances. This case, which I consider as deriving very considerable authority from the circumstances I have stated, goes the full length of negating the proposition that the will alone takes a simple contract debt out of the statute.

Previous to that case another had intervened (*Vaughan v. Guy*, Mos. 245) referring to this doctrine : but the facts did not call for a decision to that extent ; sufficiently justifying the court in overruling the plea, the death having occurred before the statute had operation, when therefore a trust was created upon a subsisting debt not barred.

The next case is *Jones v. The Earl of Strafford*, 3 P. Wms. 79, also before Lord King, assisted by Lord Raymond, who thought that ought to take the same course as *Blakeway v. The Earl of Strafford*, leaving untouched the weight and authority of that decision by the House of Lords.

The case of *Morse v. Langham* (at the Rolls, 1st July, 1737) is not in print ; but I have been favored with manuscript notes of it, — the one I received from the Lord Chancellor, the other from Lord Redesdale. The former represents it as a bill against an executor upon a note given by the testator in 1725, upon which an action was brought in 1736, to which the statute was pleaded. The equity of the bill was, that by a will made a year after the date of the note the testator had devised his estate charged with his debts. The answer, admitting the note, insisted upon the statute. The Master of the Rolls said it was a plain case ; that the debt, though at law barred by the statute, being kept alive by the charge upon the real estate and intended to be paid, was not barred when the will was made, by which the estate was subjected

THE STUDY OF CASES.

to the debts ; and the House of Lords had, with the advice of all the judges, held that a trust was not barred by the statute. The decree was accordingly pronounced for the plaintiff.

I have compared this case with the Register's book, and find that a material fact is omitted in that note, which might make a considerable difference, and proves that case to be no authority upon a debt by simple contract actually barred before the testator's death. I do not rely upon the circumstance brought forward by this note that the will was made within six years. The time of the death is to be looked to, not that of making the will ; and the time of the death is not stated in the note : but it appears by the Register's book that the plaintiff lent the testator £20 upon his note in April, 1726 ; who by his will, made twelve days afterwards, subjected his real estate to his debts ; directing the defendant, his son, who was his heir, devisee, and executor, to pay his debts and legacies out of his real and personal estates ; and the answer admitted that the death took place on the 28th of April, 1726 ; the note having been given on the 5th, and the will being made on the 18th. It was clear, therefore, that the statute could not be urged by the trustee against the *cestui que trust* calling for an account. The creditor died in 1733. The answer contains an admission that might perhaps be considered as an acknowledgment, that would take it out of the statute ; but, independent of that, the circumstance of the death is quite sufficient. The decree accordingly directed an account of the principal and interest due, and payment.

The case of *Lacon v. Briggs*, 3 Atk. 105, as far as regards the facts and the decision proves to be as little an authority upon this subject ; though Lord Hardwicke, by what he is reported to have said, appears to give considerable countenance to the existence of such a rule : but this review of the antecedent cases shows that there is no authority applying

directly to the point, where the statute had actually attached. If the reference to Lord Strafford's case as establishing the rule is to be considered as made by Lord Hardwicke, it is extraordinary, when Lord King had on the authority of that case decided against that rule ; and ten years afterwards Lord Hardwicke himself, so far from considering the rule so settled by Lord Strafford's case, refers to it as having shaken the doctrine.

The next case is *Oughterloney v. Earl Powis*, Amb. 231, and there Lord Hardwicke's language is very different. He dismissed the bill, presuming satisfaction, which removes all the effect of the virtual acknowledgment ; but in addition to that, this case shows that Lord Hardwicke certainly did not consider the doctrine established, referring expressly to Lord Strafford's case as having considerably shaken the authority of former determinations.

The case of *Ketelby v. Ketelby*, 2 Dick. 512, cited 2 Anstr. 527, from the expression where it is mentioned in Anstruther, might be supposed to involve this question ; but upon examining the Register's book I find that the only point was that upon the exceptions with reference to interest, and the distinction in that respect between creditors by bond and simple contract ; and there is no trace of this point either decided or raised, nor upon the circumstances could it have arisen.

There is a *dictum* of Lord Mansfield (*Cowp.* 548, *Trueman v. Fenton*) showing his conception of this doctrine of a court of equity, and that such an idea had been afloat upon this subject ; which is abundantly proved : but the principle and authorities had not been then examined. In *The Executors of Fergus v. Gore*, 1 Sch. & Lefroy, 109, Lord Redesdale, when this point was drawn to his attention, expresses his doubt whether there ever was such a decision as that reported in *Blakeway v. The Earl of Strafford*, and lays down this clear rule : "That a devise in trust for payment of debts does

not prevent setting up the statute, if the time had run before the testator's death ; for if it has run in the life of the testator the debts are presumed to be paid : but where a provision is made by will for payment of debts, the statute does not run after the death of the testator. It is an acknowledgment of the debt."

Though this is not the point decided, Lord Redesdale's declaration may be opposed to those of his predecessors.

The only case remaining to be noticed is *Ex parte Dewdney*, 15 Ves. 477 ; not a direct decision, but showing the Lord Chancellor's impression upon this point. I applied to the Lord Chancellor for the case before Sir Thomas Sewell, to which his Lordship refers. The note states merely that Sir Thomas Sewell held that a bond debt supposed to be satisfied was revived by the trust ; but that was afterwards reversed by the Lord Chancellor, — a strong authority against this argument ; the judgment of the Master of the Rolls sustaining the debt against the presumption from length of time, being overruled by the Lord Chancellor.

I have now gone through all the cases that are to be found in print or manuscript upon this important question ; and the result is, that there is not one in which this doctrine has been established to the full extent that has been contended : that it rests simply upon *dicta*, opposed by *dicta*, and has been disapproved by every judge from the time of Lord Hardwicke ; that it is contrary to the decision in *Legastick v. Cowne*, Mos. 391, and to the final decision in Lord Strafford's Case, followed by the ultimate decision of Lord King, who first determined that case, and substantially contradicted by every subsequent authority.

If the question is to be considered still open upon the conflicting authorities, how does it stand upon principle ? It must depend upon that which alone can subject a real estate to debts by simple contract ; the intention : in this instance an intention most absurd, rash, and destructive to the estate ;

declaring openly that his executor is not to set up the statute against any demand incurred by simple contract during his whole life ; inviting stale demands. His meaning must be taken to be only what shall turn out to be his just debts. There is no direction for any inquiry as to the amount, nature, reality, extent, or whether there had been any payment. The executor is not directed expressly to plead the statute, nor is there any implication of such intention ; but it is to take the ordinary course ; his debts are to be discharged, but the investigation of them is left to the executor under the direction of the courts of law and equity. If a devise of this kind can have the effect contended, the statute would be a snare to those who, relying on it, might after six years destroy their vouchers. The notion that these are comprehended under the description " just debts," as still subsisting in *foro conscientie*, is *petitio principii*. The statute, which was made for the benefit of those who may have paid but have not the means of proving it, upon general principles, for the quiet and peace of mankind, does not permit a demand of debt beyond its limits to be enforced upon the possibility that it may still be undischarged. The plain line is, that the testator intends the courts of law and equity to determine what are just debts, leaving his executor at liberty to use all means of resistance prescribed or allowed by the law ; thus encouraging provisions for creditors by the assurance of a protection to the assets against demands which the testator himself could have resisted, who, relying on the statute, may have destroyed his vouchers.

The conclusion is, that this doctrine, standing upon an unnatural conjecture as to the intention, pregnant with danger and injury, by inviting stale demands and discouraging provisions for the payment of debts, ought not, unless established by authority, to stand as the rule ; and I have endeavored to show that there is no decision that a devise for the payment of debts has the effect of reviving debts barred by

THE STUDY OF CASES.

the statute before the death of the devisor ; but they are left open to examination by all the means which the rules of law and equity admit.

The exceptions were overruled.¹

Case 12. — Hilliard v. Richardson.

HILLIARD v. RICHARDSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1856.

[3 Gray, 349.]

ACTION of tort to recover damages for an injury sustained by the plaintiff while driving upon a highway in the City of Cambridge. Trial before Merrick, J., who reported the case, after a verdict for the plaintiff, for the consideration of the full court.

The evidence tended to prove the following facts : Between the hours of five and six in the afternoon of December 5, 1851, the plaintiff was driving in a wagon in and through said highway, when the horse suddenly took fright at a pile of boards lying by the side of the way, but within its limits, bolted from his course, and carried the wheel of the wagon violently against a post near the edge of the sidewalk, whereby the plaintiff was thrown violently from the wagon, and seriously injured. The boards were placed there the same afternoon, and not long before the occurrence of the accident, by a teamster, acting under the direction of Lewis Shaw, with the intention of allowing them to remain till the morning of the next day, and then removing them to the land adjoining the highway. This land, and the buildings upon it, belonged to the defendant, and were in his possession, except so far as they were occupied by Shaw in the execution of a written contract with the defendant, and under

¹ See §§ 35, 37, 39-41, 53, 55-56, 58-59, 66, 68, 73-79, 93-96.

The Vice-Chancellor was Sir THOMAS PLUMER.

license from him. By that contract, Shaw agreed, for a specific price, and before a day named, to alter a certain paper factory into two dwelling-houses, according to a plan and specifications annexed to the contract, and to make certain repairs thereon, and to furnish all the requisite materials. The defendant also gave Shaw license to use, while he should be engaged in the execution of the contract, one of the buildings upon the land to shape and finish work for buildings of his own, in which the defendant had no interest. Shaw procured the boards and brought them to the place, chiefly for the purpose of using them in the alteration of the defendant's buildings, under the written contract, and was, at the time of the accident, actually engaged in the execution of that contract.

The presiding judge instructed the jury, among other things, that "the act of laying and leaving the boards in the highway by Shaw must, for the purposes of this action, be deemed the act of the defendant;" and that, "as the boards at which it was alleged that the horse took fright, were procured by Shaw, to be used, in whole or in part, in performance and execution of the written contract between him and the defendant, and were materials necessary therefor, the defendant was responsible for the acts of Shaw, in placing the boards in the highway, and suffering them to remain there; and that his liability in relation thereto was in all respects the same as the liability of Shaw."

C. G. Loring, for the defendant.

R. Choate & J. W. May, for the plaintiff.

The decision was made at March term, 1856.

THOMAS, J. The questions raised by the report are upon the instructions given by the presiding judge to the jury. The material question, that upon which the case hinges, is whether, upon the facts reported, the defendant is liable for the acts and for the negligence and carelessness of Shaw.

In looking upon the case reported, it is to be observed,

THE STUDY OF CASES.

1st. That the acts done by Shaw, and which are charged as negligence, were not done by any specific direction, or order, or request of the defendant. 2dly. That between the defendant and Shaw the ordinary relation of master and servant did not exist. 3rdly. That the acts done, and which are charged as negligence, were not done upon the land of the defendant. They did not consist in the creating or suffering of a nuisance upon his own land, to the injury of another. 4thly. That the boards placed in the highway were not the property of the defendant ; that he had no interest in them, and could exercise no control over them. 5thly. That the defendant did not assume to exercise any control over them. 6thly. That there is no evidence of any purpose on the part of the defendant to injure the plaintiff, or anybody else, or so to use his property, or suffer it to be so used, as to occasion an injury.

Was the defendant liable for the negligent acts of Shaw in the use of the highway? As a matter of reason and justice, if the question were a new one, it would be difficult to see on what solid ground the claim of the plaintiff could rest. But he says that such is the settled law of this commonwealth, and that the question is now no longer open for discussion. Three cases are especially relied upon by the plaintiff, as settling the rule in Massachusetts. They are *Stone v. Codman*, 15 Pick. 297 ; *Lowell v. Boston & Lowell Railroad*, 23 Pick. 24 ; and *Earle v. Hall*, 2 Met. 353.

Stone v. Codman was this : The defendant employed one Lincoln, a mason, to dig and lay a drain from the defendant's stores, in the city of Boston, to the common sewer. By reason of the opening made by Lincoln and the laborers in his employment, water was let into the plaintiff's cellar, and his goods were wet. 1. Lincoln procured the materials and hired the laborers, charging a compensation for his services and disbursements. 2. The acts causing the injury to the plaintiff's goods were done upon the defendant's land, and in

the use of it for the defendant's benefit. 3. There was no contract, written or oral, by which the work was to be done for a specific price, or as a job. 4. The case is expressly put upon the ground that between the defendant and Lincoln the relation of master and servant existed. The Chief Justice, in delivering the opinion of the court, said: "Without reviewing the authorities, and taking the general rule of law to be well settled, that a master or principal is responsible to third persons for the negligence of a servant, by which damage has been done, we are of opinion that, if Lincoln was employed by the defendant to make and lay a drain for him, on his own land, and extending thence to the public drain, he (Lincoln) procuring the necessary materials, employing laborers, and charging a compensation for his own services and his disbursements, he must be deemed, in a legal sense, to have been in the service of the defendant, to the effect of rendering his employer responsible for want of skill, or want of due diligence and care; so that, if the plaintiff sustained damage by reason of such negligence, the defendant was responsible for such damage." The case well stands on the relation of master and servant. The work was under the control of the defendant. He could change, suspend, or terminate it, at his pleasure. Lincoln was upon the land with only an implied license, which the defendant could at any moment revoke. The work was done by Lincoln, not on his own account, but on the defendant's. The defendant was indeed acting throughout by his servants. The injury was done by the escape of water from land of the defendant to that of the plaintiff, which the defendant could have and was bound to have prevented.

The second case relied upon by the plaintiff is that of *Lowell v. Boston & Lowell Railroad*, 23 Pick. 24. In a previous suit (*Currier v. Lowell*, 16 Pick. 170), the town of Lowell had been compelled to pay damages sustained by Currier by reason of a defect in one of the highways of the

THE STUDY OF CASES.

town. That defect was caused in the construction of the railroad of the Boston & Lowell Company. It consisted in a deep cut through the highway, made in the construction of the railroad. Barriers had been placed across the highway, to prevent travellers from falling into the chasm. It became, in the construction of the railroad, necessary to remove the barriers, for the purpose of carrying out stone and rubbish from the deep cut. They were removed by persons in the employ of the corporation, who neglected to replace them. Currier and another person, driving along the highway in the night time, were precipitated into the deep cut, and seriously injured. Currier brought his action against the town of Lowell, and recovered damages. This action was to recover of the railroad corporation the amount the town had been so compelled to pay. The railroad corporation denied their responsibility for the negligence of the persons employed in the construction of that part of the railroad where the accident took place, because that section of the road had been let out to one Noonan, who had contracted to make the same for a stipulated sum, and had employed the workmen. This defence was not sustained; nor should it have been. The defendants had been authorized by their charter to construct a railroad from Boston to Lowell, four rods wide through the whole length. They were authorized to cross turnpikes or other highways, with power to raise or lower such turnpikes or highways, so that the railroad, if necessary, might pass conveniently over or under the same. St. 1830, c. 4, §§ 1, 11. Now it is plain that it is the corporation that are intrusted by the legislature with the execution of these public works, and that they are bound, in the construction of them, to protect the public against danger. It is equally plain that they cannot escape this responsibility by a delegation of this power to others. The work was done on land appropriated to the purpose of the railroad, and under authority of the corporation vested in them by law for the

purpose. The barriers, the omission to replace which was the occasion of the accident, were put up and maintained by a servant of the corporation, and by their express orders; and that servant had the care and supervision of them. The accident occurred from the negligence of a servant of the railroad corporation, acting under their express orders. The case, then, of *Lowell v. Boston & Lowell Railroad* stands perfectly well upon its own principles, and is clearly distinguishable from the case at bar. The court might well say, that the fact of Noonan being a contractor for this section did not relieve the corporation from the duties or responsibility imposed on them by their charter and the law, especially as the failure to replace the barriers was the act of their immediate servant, acting under their orders.

The only respect, it seems to us, in which this case aids the doctrine of the plaintiff, is that the learned judge who delivered the opinion of the court cites with approbation the case of *Bush v. Steinman*, 1 Bos. & Pul. 404, as "fully supported by the authorities and by well established principles." It is sufficient to remark, in passing, that the decision of the case before the court did not involve the correctness of the rule in *Bush v. Steinman*.

The case of *Earle v. Hall*, 2 Met. 353, is the third case cited by the plaintiff, as affirming the doctrine upon which he relies. Hall agreed to sell land to one Gilbert. Gilbert agreed to build a house upon and pay for the land. While the agreement was in force, Gilbert, in preparing to build the house on his own account, by workmen employed by him alone, undermined the wall of the adjoining house of the plaintiff. It was held that Hall was not answerable for the injury, although the title to the land was in him at the time the injury was committed. The general doctrine is stated to be, that we are not merely to inquire who is the general owner of the estate, in ascertaining who is responsible for acts done upon it injurious to another; but who has the

efficient control, for whose account, at whose expense, under whose orders is the business carried on, the conduct of which has occasioned the injury. The case of *Bush v. Steinman* is cited as a leading case, "very peculiar, and much discussed;" but we do not perceive that the point it decides is affirmed. The general scope of the reasoning in *Earle v. Hall*, as well as the express point decided, are adverse to it.

These cases, neither in the points decided nor the principles which they involve, support the rule contended for by the plaintiff.

But the plaintiff says that the well-known case of *Bush v. Steinman* is directly in point, and that that case is still the settled law of Westminster Hall. If so, as authority, it would not conclude us; though, as evidence of the law, it would be entitled to high consideration.

Upon this case of *Bush v. Steinman* three questions arise :
1. What does it decide? 2. Does it stand well upon authority or reason? 3. Has its authority been overthrown or substantially shaken and impaired by subsequent decisions?

1. The case was this : A, having a house by the roadside, contracted with B to repair it for a stipulated sum ; B contracted with C to do the work ; C with D to furnish the materials ; the servant of D brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned. *Held*, that A was answerable for the damage sustained.

2. At the trial, Chief Justice Eyre was of opinion that the defendant was not answerable for the injury. In giving his opinion at the hearing in banc, he says he found great difficulty in stating with accuracy the grounds on which the action was to be supported ; the relation of master and servant was not sufficient ; the general proposition, that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, seemed to be too large and loose. He relied, as authorities,

upon three cases only: *Stone v. Cartwright*, 6 T. R. 411; *Littledale v. Lonsdale*, 2 H. Bl. 267; and a case stated upon the recollection of Mr. Justice Buller.

Stone v. Cartwright lays no foundation for the rule in *Bush v. Steinman*. The decision was but negative in its character. It was, that no action would lie against a steward, manager or agent, for the damage of those employed by him in the service of his principal. This is the entire point decided. Lord Kenyon said: "I have ever understood that the action must be brought against the hand committing the injury, or against the owner for whom the act was done." The injury complained of was done upon the land of the defendant, and by his servants. It consisted in so negligently working the defendant's mine as to undermine the plaintiff's ground and buildings above it, so that the surface gave way. The mine was in the possession and occupation of the defendant; the injury was direct and immediate; the workmen were the servants of the owner.

The case of *Littledale v. Lonsdale*, in its main facts, cannot be distinguished from *Stone v. Cartwright*. It stands upon the same grounds. The defendant's steward employed the underworkmen. They were paid out of the defendant's funds. The machinery and utensils belonged to the defendant, and all the persons employed were his immediate servants.

The third case was but this: A master having employed his servant to do some act, this servant, out of idleness, employed another to do it; and that person, in carrying into execution the orders which had been given to the servant, committed an injury to the plaintiff, for which the master was held liable. What was the nature of the acts done does not appear. And whether the case was rightly decided or not, it is difficult to see any analogy between it and the case the lord chief justice was considering.

Mr. Justice Heath referred to the action for defamation brought against Tattersall, who was the proprietor of a news-

THE STUDY OF CASES.

Amos in
Don.
to man
paper with sixteen others. The libel was inserted by the persons whom the proprietors had employed by contract to collect the news and compose the paper, yet the defendant was held liable. It would seem to be not very material who composed the paper, but who owned and published it.

Mr. Justice Heath also cited, as in point, the case of *Rosewell v. Prior*, 2 Salk. 460, which was an action upon the case for obstructing ancient lights. The defendant had erected upon his land the obstruction complained of. There had been a former recovery for the erection; this suit was for the continuance. The premises of the defendant had been leased. The question was, whether the action would lie for the continuance after his lease. "*Et per cur.* It lies; for he transferred it with the original wrong, and his demise affirms the continuance of it; he hath also rent as a consideration for the continuance, and therefore ought to answer the damage it occasions."

Mr. Justice Rooke, in addition to the cases of *Stone v. Cartwright*, and *Littledale v. Lonsdale*, alluded also to the case of *Michael v. Alestree*, 2 Lev. 172, in which it was held that an action might be maintained against a master for damage done by his servant to the plaintiff in exercising his horses in an improper place, though he was absent, because it should be intended that the master sent the servant to exercise the horses there. See *Parsons v. Winchell*, 5 Cush. 595.

The examination of these cases justifies the remark that *Bush v. Steinman* does not stand well upon the authorities, and is not a recognition of principles before that time settled. The rule it adopts is apparently for the first time announced.

23 Does it stand well upon the reasoning of the court? We think all the opinions given in it lose sight of these two important distinctions: In the cases cited and relied upon, the acts done, which were the subjects of complaint, were either acts done by servants or agents under the efficient control of the defendants, or were nuisances created upon

the premises of the defendants, to the direct injury of the estate of the plaintiffs. The servant of the limeburner was not the servant of the defendant; over him the defendant had no control whatsoever; to the defendant he was not responsible. There was no nuisance created on the defendant's land. It does not appear that the defendant owned the fee of the highway. The case is put on the ground that the lime was put near the premises of the defendant, and with a view of being carried upon them. The lime was not on the defendant's land; he did not direct it to be put there; he had not the control of the man who put it there.

Mr. Justice Heath said: "I found my opinion on this single point, viz., that all the subcontracting parties were in the employ of the defendant." This is not so, unless it be true that a man who contracts with a mason to build a house employs the servant of the man who burns the lime.

Mr. Justice Rooke said: "The person from whom the whole authority is originally derived, is the person who ought to be answerable, and great inconvenience would follow if it were otherwise." It cannot be meant that one who builds a house is to be responsible for the negligence of every man and his servants who undertakes to furnish materials for the same. Such a rule would render him liable for the most remote and inconsequential damages. But the act complained of did not result from the authority of the defendant. The authority under which the servant of the limeburner acted was that of his master. And neither the limeburner nor his servant was acting under the authority of the defendant, or subject to his control. The defendant might, with the same reason, have been held liable for the carelessness of the servant who burnt the lime, and of the servant of the man who furnished the coals to burn the lime.

3. Has the doctrine of the case of *Bush v. Steinman* been affirmed in England, or has it been overruled and its authority impaired?

THE STUDY OF CASES.

The plaintiff cites the case of *Sly v. Edgely*, at Nisi Prius, 6 Esp. R. 6. The defendant, with others, then owning several houses, the kitchens of which were subject to be overflowed, employed a bricklayer to sink a large sewer in the street. The bricklayer opened the sewer and left it open, and the plaintiff fell in. It was contended that the bricklayer was not the servant of the defendant. He was employed to do a certain act, and the mode of doing it, which had caused the injury, was certainly his own. Lord Ellenborough is reported as saying, "It is the rule of *respondet superior*; what the bricklayer did, was by the defendant's direction." It does not appear how the bricklayer was employed. If not by independent contract, the case stands very well on the relation of master and servant. A case at Nisi Prius, so imperfectly reported, can have but little weight.

Another case at Nisi Prius was that of *Matthews v. West-London Water Works*, 3 Campb. 403, in which the defendants, contracting with pipelayers to lay down pipes for the conveyance of water through the streets of the city, were held liable for the negligence of workmen employed by the pipelayers. The case is very briefly stated, and no reasons, given by Lord Ellenborough for his opinion, reported. It may stand on the ground that the defendants, having a public duty to discharge, as well as right given, could not delegate this trust, so as to exempt themselves from responsibility. This case is alluded to in *Overton v. Freeman*, 11 C. B. 872, hereafter to be examined, where Maule, J., makes the following remarks concerning it: "That is but a Nisi Prius case; the report is short and unsatisfactory; and the particular circumstances are not detailed."

In *Harris v. Baker*, 4 M. & S. 27, and in *Hall v. Smith*, 2 Bing. 156, it was held that trustees or commissioners, entrusted with the conduct of public works, were not liable for injuries occasioned by the negligence of the workmen employed under their authority. These cases stand upon

the ground that an action cannot be maintained against a man acting gratuitously for the public, for the consequences of acts which he is authorized to do, and which on his part are done with due care and attention. They give no sanction whatever to the doctrine of *Bush v. Steinman*.

In *Randleson v. Murray*, 8 Ad. & El. 109, a warehouseman in Liverpool employed a master porter to remove a barrel from his warehouse. Through the negligence of his men the tackle failed, and the barrel fell and injured the plaintiff. *Held*, that the warehouseman was liable. The case is put distinctly on the relation of master and servant. Lord Denman said: "Had the jury been asked whether the porters, whose negligence occasioned the accident, were the servants of the defendant, there can be no doubt they would have found in the affirmative." The injury occurred also in the direct use of the defendant's estate.

In *Burgess v. Gray*, 1 C. B. 578, the defendant, owning and occupying premises adjoining the highway, employed one Palmer to make a drain from his land to the common sewer. In doing the work, the men employed by Palmer placed gravel on the highway, in consequence of which the plaintiff, in driving along the road, sustained a personal injury. There was evidence that, upon the defendant's attention being called to the gravel, he promised to remove it. The matter left to the jury was whether the defendant wrongfully put, or caused to be put, the gravel on the highway. "I think," says Tindal, C. J., "there was evidence to leave to the jury in support of that charge. If, indeed, this had been the simple case of a contract entered into between Gray and Palmer, that the latter should make the drain and remove the earth and rubbish, and there had been no personal superintendence or interference on the part of the former, I should have said it fell within the principle contended for by my Brother Byles, and that the damage should be made good by the contractor, and not by the individual

THE STUDY OF CASES.

for whom the work was done." After adverting to the evidence that the soil was placed upon the road with the defendant's consent, if not by his express direction, he says : " I therefore think the case is taken out of the rule in *Bush v. Steinman*, which is supposed to be inconsistent with the later authorities." Coltman, J., said : " I think there was evidence enough to satisfy the jury that the entire control of the work had not been abandoned to Palmer." Cresswell, J., said : " No precise contract for the work was proved ; nor was it shown that Palmer was employed to do the work personally, the mode of doing it being left to his judgment and discretion. I think there was abundant evidence to show that the defendant at least sanctioned the placing of the nuisance on the road." Erle, J., said : " The work was done with the knowledge of the defendant, and under his superintendence, and for his benefit." This well-considered case, it is plain, so far from affirming the rule in *Bush v. Steinman*, is carefully and anxiously taken out of it by the counsel, and by the court, with the strongest intimation by the latter, that, but for the difference, the action could not be maintained.

The latest case in England referred to in the learned argument of the plaintiff's counsel, as affirming the doctrine of *Bush v. Steinman*, is *Sadler v. Henlock*, in the Queen's Bench (1855), 4 El. & Bl. 570. The defendant, with the consent of the owner of the soil and the surveyor of the district, employed one Pearson, a laborer, but skilled in the construction of drains, to cleanse a drain running from the defendant's garden under the public road, and paid five shillings for the job. *Held*, that the defendant was liable for an injury occasioned to the plaintiff by reason of the negligent manner in which Pearson had left the soil of the road over the drain. The case is put by all the judges distinctly on the relation of master and servant. And Crompton, J., said : " The test here is. whether the defendant retained the power of controlling the work. No distinction can be

drawn from the circumstance of the man being employed at so much a day or by the job. I think that here the relation was that of master and servant, not of contractor and contractee. It is only on the ground of a contractor not being a servant that I can understand the authorities." The case of *Bush v. Steinman* is not referred to by either of the justices ; but the distinction of servant and contractor runs through the whole case, — a distinction which is wholly inconsistent with the doctrine of *Bush v. Steinman*.

In *Laugher v. Pointer*, 5 B. & C. 547, and 8 D. & R. 556 (1826), where the owner of a carriage hired of a stablekeeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to the horse of a third person, it was held by Lord Tenterden, C. J., and Littledale, J., that the owner of the carriage was not liable for such injury ; Bayley and Holroyd, Justices, dissenting. This case is, in substance, the one put by Mr. Justice Heath, in illustration and support of the judgment in *Bush v. Steinman*. In the opinions of Lord Tenterden and of Littledale, J., the doctrines of *Bush v. Steinman*, in their application to personal property, are examined, and their soundness questioned.

In *Quarman v. Burnett*, 6 M. & W. 499 (1840), the same question arose in the Exchequer as in *Laugher v. Pointer* in the King's Bench, and the opinions of Lord Tenterden and Littledale, J., were affirmed, in a careful opinion pronounced by Baron Parke. In the course of it, he says : "Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant ; and that person is undoubtedly liable who stood in the relation of master to the wrongdoer, — he who had selected him as his servant, from the knowledge of or belief in his skill and care and who could remove him for misconduct, and whose orders he was bound to receive and obey ; and whether such servant has been appointed by the master directly, or inter-

mediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist."

These cases, however, do not overrule *Bush v. Steinman*, as to the liability of owners of real estate.

The case of *Milligan v. Wedge*, 12 Ad. & El. 737, and 4 P. & Dav. 714 (1840), is also in relation to the use of personal property, and rests upon the rule settled in *Quarman v. Burnett*. But in this case Lord Denman suggests a doubt whether the distinction as to the law in cases of fixed and movable property can be relied on.

The case of *Rapson v. Cubitt*, 9 M. & W. 710 (1842), was this: The defendant, a builder, employed by the committee of a club to make certain alterations at the clubhouse, employed a gasfitter by a subcontract to do that part of the work. In the course of doing it, by the negligence of the gasfitter, the gas exploded and injured the plaintiff. *Held*, that the defendant was not liable. The reasons upon which this decision is based do not well consist with the rule in *Bush v. Steinman*.

The case of *Allen v. Hayward*, 7 Ad. & El. N. R. 960 (1845), is still more directly adverse. But we pass from these to cases directly in point.

In the cases of *Reedie & Hobbit v. London & North-western Railway*, 4 Exch. 244, 254 (1849), the defendants, empowered by act of parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and, by the contract, reserved to themselves the power of dismissing any of the contractors' workmen for incompetence. The workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath, along the highway, by allowing a stone to fall upon him. In an action against the company, it was held

that they were not liable, the terms of the contract making no difference. In the judgment of the court, given by Baron Rolfe (now Lord Chancellor Cranworth), alluding to the supposed distinction as to real property, the court say: "On full consideration, we have come to the conclusion that there is no such distinction, unless, perhaps, in cases where the act complained of is such as to amount to a nuisance; and, in fact, that, according to the modern decisions, *Bush v. Steinman* must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the court proceeded." Without sanctioning this doctrine, as it affects a public trust, it is very plain that it directly overrules the doctrine of *Bush v. Steinman*. overruled

The case of *Knight v. Fox*, 5 Exch. 721 (1850), is, if possible, a stronger case in the same direction, — a decision which it is plain could not have been made if the doctrines of *Bush v. Steinman* were the law of Westminster Hall.

There are three cases remaining. In *Overton v. Freeman*, 11 C. B. 867 (1851), A contracted to pave a district, and B entered into a subcontract with him to pave a particular street. A supplied the stones, and his carts were used to carry them. B's men, in the course of the work, negligently left a heap of stones in the street. The plaintiff fell over them and broke his leg. It was held, that A was not liable, even though the act complained of amounted to a public nuisance. And Maule, J., said that the case of *Bush v. Steinman* "has been considered as having laid down the law erroneously." C. B.

In *Peachey v. Rowland*, 13 C. B. 182 (1853), the defendants contracted with A to fill in the earth over a drain which was being made for them across a portion of the highway from their house to the common sewer. A, after having filled it in, left the earth so heaped above the level of the highway as to constitute a public nuisance, whereby the plaintiff, in driving along the road, sustained an injury. The case had

THE STUDY OF CASES.

this other feature : A few days before the accident, and before the work was finished, one of the defendants had seen the earth so heaped over a portion of the drain ; but beyond this there was no evidence that either defendant had interfered with or exercised any control over the work. It was held there was no evidence to go to the jury of the defendants' liability. *Bush v. Steinman* appears not to have been cited by counsel or alluded to by the court.

The still more recent case of *Ellis v. Sheffield Gas Consumers' Co.* 2 El. & Bl. 767 (1853), cited by the counsel for the plaintiff, only determined that a party employing another to do an act unlawful in itself will be liable for an injury such act may occasion, — very familiar and well settled law.

Bush v. Steinman is no longer law in England. If ever a case can be said to have been overruled, indirectly and directly, by reasoning and by authority, this has been. No one can have examined the case without feeling the difficulty of that clear-headed judge, Chief Justice Eyre, of knowing on what ground its decision was put. It could not stand on the relation of master and servant. That relation did not exist. It could not stand upon the ground of the defendant having created or suffered a nuisance upon his own land to the injury of his neighbor's property. The lime was on the highway. There is no rule to include it but the indefinitely broad and loose one that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, — a rule which ought to have been and was expressly repudiated.

The case of *Leslie v. Pounds*, 4 Taunt. 649, not cited in the argument, has some resemblance to the cases before referred to. This was an action against the landlord of a house leased, who, under contract with the tenant, who was bound to repair, employed workmen to repair the house, and superintended the work. Being remonstrated with by the commis-

stoners of pavements as to the dangerous state of the cellar, he promised to take care of it, and had put up some boards temporarily as a protection to the public. They proved insufficient, and the plaintiff falling through, the landlord was held liable. The case was decided on the ground that the landlord was making the repairs, and that the workmen were employed by him, and were his servants.

The suggestion is made that, whatever may be the result of the later cases in England, the doctrine of *Bush v. Steinman* has been affirmed in this country. The cases in this court we have already examined.

The case of *Bailey v. Mayor, &c. of New York*, 3 Hill, 531, and 2 Denio, 433, was an action brought against the corporation of New York, for the negligent and unskilful construction of the dam for the water-works at Croton River, by the destruction of which, injury was occasioned to the mills of the plaintiff. The city was held responsible. This case rests well upon the ground that where persons are invested by law with authority to execute a work involving ordinarily the exercise of the right of eminent domain, and always affecting rights of third persons, they are to be liable for the faithful execution of the power, and cannot escape responsibility by delegating to others the power with which they have been intrusted.

Blake v. Ferris, 1 Seld. 48, seems to conflict with *Bailey v. Mayor, &c. of New York*. Certain persons were permitted to construct a public sewer at their own expense; they employed another person to do it at an agreed price for the whole work; the plaintiffs received an injury from the negligent manner in which the sewer was left at night. It was held that the persons who were authorized to make the sewer were not responsible for the negligence of the servants of the contractor. This case utterly rejects the rule of *Bush v. Steinman*.

The case of *Stevens v. Armstrong*, 2 Seld. 435, was this:

THE STUDY OF CASES.

A bought a heavy article of B, and sent a porter to get it ; by permission of B, the porter used his tackle and fall ; through negligence, the porter suffered the article to drop, by which C was injured. It was held, that the porter acted as the servant of A, and that B was not answerable. Yet this was an injury done on B's estate, by his permission, and in the use of his property. This case also rejects the rule of *Bush v. Steinman*.

In *Lesh v. Wabash Navigation Co.*, 14 Ill. 85, where a corporation was authorized to take materials to construct public works, and contracted with others to do the work and find the materials, and the contractors nevertheless took the materials under the authority granted to the corporation, the corporation were held liable therefor. If the court could find that the materials were taken under the authority of the corporation, the case will stand perfectly well under the rule of *Lowell v. Boston & Lowell Railroad*, and *Bailey v. Mayor, &c. of New York*.

The cases of *Willard v. Newbury*, 22 Verm. 458, and *Batty v. Duxbury*, 24 Verm. 155, rest on the same principles.

In the case of *Wiswall v. Brinson*, 10 Ired. 554, the court held an owner of real estate responsible for the negligence of the servants of a carpenter with whom the defendant had contracted, for a stipulated price, to remove a barn on to his premises. This case (in which, however, there was a divided judgment, Ruffin, C. J., dissenting in a very able opinion), certainly sustains the doctrine of *Bush v. Steinman*.

De Forrest v. Wright, 2 Mich. 368, not cited, is in direct conflict with the rule of *Bush v. Steinman*. A public, licensed drayman was employed to haul a quantity of salt from a warehouse, and deliver it at the store of the employer at so much a barrel. While in the act of delivering it, one of the barrels, through the carelessness of the drayman, rolled against and injured a person on the sidewalk. It was held, that the employer was not liable for the injury, the drayman

exercising a distinct and independent employment, and not being under the immediate control and direction or supervision of the employer. This is a well considered case, rejecting the rule of *Bush v. Steinman*, and sanctioning the result to which we have been brought in the case at bar.

We have thus, at the risk of tediousness, examined the case at bar as one of authority and precedent. The clear weight and preponderance of the authorities at common law is against the rule given to the jury.

The rule of the civil law seems to have limited the liability to him who stood in the relation of *paterfamilias* to the person doing the injury. Inst. lib. 4, tit. 5, §§ 1, 2; 1 Domat, pt. 1, lib. 2, tit. 8, § 1; Dig. lib. 9, tit. 2, § 1.

Viewing this as a question, not of authority, but to be determined by the application to these facts of settled principles of law, upon what principle can the defendant be held responsible for this injury? He did not himself do the act which caused the injury to the plaintiff. It was not done by one acting by his command or request. It was not done by one whom he had the right to command, over whose conduct he had the efficient control, whose operations he might direct, whose negligence he might restrain. It was not an act done for the benefit of the defendant, and from the doing of which an implied obligation for compensation would arise. It was not an act done in the occupation of land by the defendant, or upon land to which, upon the facts, he had any title. To say that a man shall be liable for injuries resulting from acts done *near* to his land, is to establish a rule as uncertain and indefinite as it is manifestly unjust. It is to make him liable for that which he cannot forbid, prevent, or remove. The case cannot stand on the relation of master and servant. It cannot stand upon the ground of nuisance erected by the owner of land, or by his license, to the injury of another. It cannot stand upon the ground of an act done in the execution of a work under the public authority, as the construction

THE STUDY OF CASES.

of a railroad or canal, and from the responsibility, for the careful and just execution of which, public policy will not permit the corporation to escape by delegating their power to others. It can only stand, where *Bush v. Steinman*, when carefully examined, stands, upon the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, — to adopt which would be to ignore all limitations of legal responsibility.

As the determination of this, the first and most material of the exceptions, may probably finally dispose of the cause, we have not considered the other points of exception to the rulings of the presiding judge.

*New trial granted.*¹

Case 13. — *In re Walker.*

IN RE WALKER.

SHEFFIELD BANKING COMPANY *v.* CLAYTON.

CHANCERY DIVISION. 1892.

[(1892) 1 *Ch.* 621.]

FURTHER consideration.

This was an action to administer the estate of Hugh Walker, deceased.

On the 7th of May, 1885, the testator guaranteed the current account of Messrs. Spencer Brothers, of Sheffield, with the Sheffield and Rotherham Banking Company, Limited, to the extent of £1,000.

By an indenture, dated the 1st of August, 1885, Arthur Spencer, a member of the firm of Spencer Brothers, in consideration of the above-mentioned guarantee, assigned to the testator by way of mortgage, but subject to a previous mortgage, certain hereditaments at Sheffield, and covenanted to

¹ See §§ 5, 7-10, 18, 25, 41, 45, 53, 56, 58-60, 63, 66, 68-74, 84-97.

indemnify the testator in respect of his guarantee. On the 5th of July, 1886, the testator gave to the London and Yorkshire Bank, Limited, to whom the banking account of Spencer Brothers was then transferred, a guarantee to secure the payment of all moneys then or thereafter payable to the said bank by the firm of Spencer Brothers, not exceeding £ 1,000. On the same date Agnes Spencer, the wife of Arthur Spencer, as a security against this guarantee, executed to the testator a memorandum of deposit of title deeds, relating to certain property belonging to her, and by a further memorandum dated the 18th of August, 1886, in which her husband also joined, Mrs. Agnes Spencer agreed to execute a legal mortgage to the testator of the property comprised in the equitable mortgage to secure the said sum of £ 1,000 and interest. On the 9th of September, 1887, the banking account of Spencer Brothers was, with the approbation of Agnes Spencer, transferred to the plaintiffs, the Sheffield Banking Company, Limited, and on the same date the testator, with the full knowledge and approbation of Mrs. Spencer, gave the following guarantee to the plaintiffs: "In consideration that you will make advances and grant other accommodation at your discretion to the firm of Spencer Brothers, of Sheffield Moor, Sheffield, wholesale grocers, I hereby guarantee the payment of all such moneys as the said Spencer Brothers are, or may become, liable to pay to you on current account, or on any other account, or in any manner whatsoever, but so that the total amount recoverable under this guarantee shall not exceed two thousand pounds. . . . And this guarantee shall, in the event of my death, bind and charge my estate in respect of transactions and dealings subsequent as well as prior thereto, and continue until notice shall be given to you by me, my executors or administrators, determining the same."

The testator died on the 4th of November, 1888, and his will, dated the 12th of July, 1888, was proved by the defendants, the executors, on the 24th of January, 1889.

THE STUDY OF CASES.

On the 2d of August, 1889, the firm of Spencer Brothers became bankrupt, and there was then due from them to the plaintiffs the sum of £4,457 14s. 9d. The plaintiffs received certain dividends under the bankruptcy of the firm and from the separate estate of Arthur Spencer, in respect of collateral securities held by them, amounting in all to £1,777 17s. 6d., leaving the sum of £2,679 17s. 3d. due to them from the firm.

On the 25th of April, 1890, upon an originating summons taken out by the plaintiffs, an order was made for the administration of the testator's estate. On the 6th of June, 1890, the defendants received from the first mortgagees of the property comprised in the mortgage of the 1st of August, 1885, given by Arthur Spencer to the testator, the sum of £45 os. 6d., being the balance of the proceeds of sale of the said property after deducting what was due to the first mortgagees on their security; and on the 6th of December, 1890, the defendants received a dividend amounting to £169 10s. 3d., out of the separate estate of Arthur Spencer, in respect of his covenant to indemnify the testator.

By an agreement of compromise dated the 14th of April, 1891, and made between Agnes Spencer and the defendants, provision was made, subject to the sanction of the court, for the sale of the property comprised in the equitable mortgage of the 5th of July, 1886, and for the application of the money arising from such sale in or towards the payment of the principal and interest due under the said mortgage.

By an order dated the 30th of April, 1891, this agreement was directed to be carried into effect.

The sale was duly effected, and realized the sum of £250, which was received by the defendants.

The plaintiffs claimed to be exclusively entitled to the above-mentioned sums of £45 os. 6d., and £169 10s. 3d., on the ground that they were received by the defendants in respect of the counter-security given by Arthur Spencer to the

testator against his liability under the guarantee ; and they also claimed, on similar grounds, to be exclusively entitled to the £250 realized by the sale of the property comprised in the equitable mortgage ; and, further, that they were entitled to prove against the testator's estate for the balance of their debt.

Hastings, Q. C., and *Curtis Price*, for the plaintiffs : —

We are entitled to the benefit of the counter-securities given by Mr. and Mrs. Spencer to the testator.

We rely upon the proposition laid down in *Mawer v. Harrison*, 1 Eq. C. Ab. 93 ; Mich. 1692 ; 20 Vin. Abr. 102, tit. "Surety," and adopted by Sir W. Grant in *Wright v. Morley*, 11 Ves. 12, 22, viz., that a bond creditor is entitled to the benefit of all counter-bonds or collateral security given by the principal to the surety.

The right is, of course, confined to the case of the surety being insolvent. As the surety, if he pays the debt, is entitled to the benefit of all securities held by the creditor, so the creditor, if the surety does not pay, is entitled to the benefit of all counter-securities held by the surety.

The principle was also recognized in *The Mayor of Berwick v. Murray*, 7 D. M. & G. 497, where *Mawer v. Harrison*, 1 Eq. C. Ab. 93 ; Mich. 1692 ; 20 Vin. Abr. 102, tit. "Surety," was cited in argument as an authority.

The doctrine established by these cases has never been abrogated or overruled. It is only in the case of the surety being unable to discharge his obligation that the equity arises. Suppose that the executors of Hugh Walker had recovered £3,000 on the security, it would be manifestly unjust for the estate to take the whole, while the plaintiffs get only a dividend.

Buckley, Q. C., and *Ingle Foyce*, for the executors : —

The supposed rule has never been followed or acted upon since 1815. We submit that it is contrary to principle. How can the principal creditor be entitled to the counter-security

given by way of indemnity? It cannot be by contract, for the contract between the surety and the debtor in no way concerns the creditor.

In *Ex parte* Waring, 19 Ves. 345; 2 Gly. & J. 404; 2 Rose, 182, Lord Eldon did not treat *Mawer v. Harrison* as an authority binding at that time (1815). Sir Wm. Grant's words in *Wright v. Morley*, 11 Ves. 12, 22, amount to no more than a *dictum*.

The rule is founded on no principle, and has never been enforced. The principal creditor, no doubt, is entitled to prove against the surety's estate, but his utmost right is to fill his pocket as the surety fills his, — that is to say, he can prove against the estate of the surety, and if the surety's estate is subsequently increased by the proceeds of the counter-security, he can come in and prove again.

[STIRLING, J. Do you say that the general estate of the surety ought to have the benefit of the indemnity?]

Yes.

[STIRLING, J. Then his estate might actually recover more than he pays?]

No; it is only an indemnity. When the security is realized it is assets of the surety's estate, and as against that the principal creditor is entitled to prove. He has no right to the proceeds of the security. The surety cannot, of course, recover more than he has had to pay. As to the security given by Mrs. Spencer, she is a third party, and there is no trace of any right in the principal creditor.

R. J. Parker, for the beneficiaries under the will of the testator.

Hastings, in reply: —

It is said that the principal creditor does not get his right to the counter-security by contract. No more does the surety. It rests upon equity. The creditor is entitled to any benefit which the surety may get by his counter-security: *Heritage v. Paine*, 2 Ch. D. 594. The creditor is entitled to

be paid ; but he cannot, of course, take the security without giving the surety the benefit of it. The surety has been held entitled even to securities of which he was not aware.

The Lord Chancellor did not express any opinion in *Ex parte Waring*, 19 Ves. 345 ; 2 Gly. & J. 404 ; 2 Rose, 182, against the rule. It is true he did not express approval of it ; but against that must be set off the *dictum* in *Mayor of Berwick v. Murray*, 7 D. M. & G. 497. There is, no doubt, the absence of approval by Lord Eldon ; but we rely on the expression of Sir W. Grant in *Wright v. Morley*, 11 Ves. 12, 22, who said that it was a settled doctrine. The authority has not been so overruled that it ought not to be followed. The security given by Mrs. Spencer is on the same footing.

January 14. STIRLING, J., stated the facts, and continued : —

The plaintiff's contention was founded upon two cases : the first is an old case of *Mawer v. Harrison*, *sub nom.* *Maure v. Harrison*, 1 Eq. C. Ab. 93 ; 20 Vin. Abr. 102, tit. "Surety." It is reported very shortly as follows : "A bond creditor shall in the Court of Chancery have the benefit of all counterbonds or collateral security given by the principal to the surety ; as if A owes B money, and he and C are bound for it, and A gives C a mortgage or bond to indemnify him, B shall have the benefit of it to recover his debt." That case was decided in *Michaelmas*, 1692. The plaintiffs also relied upon a *dictum* of Sir William Grant, in *Wright v. Morley*, 11 Ves. 22, which runs thus : "I conceive that, as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor." As to the latter portion of the sentence, there is no question at all. It is well established at this date that the surety on paying the debt is entitled to stand in the place of the principal creditor, and to have the benefit of

all the securities which the principal creditor had. Now, these two cases were very much discussed in the well-known case of *Ex parte Waring*, 2 Rose, 182 ; 2 Gly. & J. 404 ; 19 Ves. 345, before Lord Eldon. That case is most fully reported perhaps in Glyn & Jameson's Reports. It appears from that report that in the course of the argument Lord Eldon spoke somewhat disparagingly of the case of *Mawer v. Harrison*, 1 Eq. C. Ab. 93 ; Mich. 1692 ; 20 Vin. Abr. 102, tit. "Surety." He said this : "I have never heard this case relied upon as a governing case at this day." In the judgment as reported he puts it thus (19 Ves. 348) : "The prayer of the first of these petitions has been supported upon this ground, that the short bills and the mortgage . . . having been placed with Brickwood & Co. as a security against their acceptances, the holders of these bills have an equity to have that security applied specifically to the discharge of those acceptances, upon the general ground, that upon a transaction of this kind a person holding the bills, which are the subject of indemnity, has a right to the benefit of the contract between the principal debtor and the party indemnified ; and, though not himself a party to that contract, to say that he, who has contracted for the payment of certain debts out of those pledges, is liable in equity to the demand upon the part of those, whose demands are to be so paid, for that application ; and a case was cited (*Mawer v. Harrison*) which goes that length. With regard to that case, or cases in general, I desire it to be understood, that I forbear to give any opinion upon that point." Then he goes on to say that he decides, not on that principle but on another ground. The result of these two cases — namely, the *dictum* of Sir William Grant, in *Wright v. Morley*, 11 Ves. 22, and the judgment and observations of Lord Eldon in *Ex parte Waring*, 19 Ves. 345 ; 2 Gly. & J. 404 ; 2 Rose, 182 — seems to me to be that Sir William Grant and Lord Eldon were not of the same mind on the point. Under these circumstances, I was very

anxious to discover what was really done in the case of *Mawer v. Harrison*, which is so shortly reported in 1 *Equity Cases*, Abridged. The Registrar has been kind enough to make search for that case. No decree was drawn up, but the entry of the case has been found in the Registrar's book, and the pleadings have been discovered, and I am indebted to the learned senior reporter of this court, Mr. Knox, for having made a summary of them for my use, the pleadings themselves being somewhat lengthy; and from them and the notes in the Registrar's book it is tolerably easy to discover what the case was. The plaintiff was Thomas Mawer; the defendants were William Harrison and William Morley, and Mary, his wife. Thomas Mawer was the father of the first wife of William Harrison, the father of William Harrison, the defendant. By that first marriage William Harrison, the father, had three children, — namely, William, the defendant, Thomas, and Margaret. The first wife having died, William Harrison, the father, married his second wife, Mary, the defendant, afterwards the wife of William Morley, and subsequently he died intestate, leaving this widow and the three children by the first wife, the persons entitled to his personal estate under the Statute of Distribution. Administration was taken out by his widow, and the share of the three children in the intestate's property amounted to £120. It appears that the plaintiff, Thomas Mawer, the grandfather of William Harrison, the defendant, was very anxious that William Harrison, his grandson, should continue the business of a farmer, which had been carried on by William Harrison, the father; but for that purpose it was necessary that the sum of £120, which formed the portion of the intestate's estate belonging to the three children, should be paid over to William Harrison, the son; and that was accordingly done. The two other children being infants, Thomas Mawer, the plaintiff in the action, gave a bond to the defendant, Mary Morley, the legal personal representative of the intestate, to indemnify her against all

claims by those children. It appears that at this time William Harrison, the defendant, was an infant, but the money was paid to him. He attained twenty-one, and carried on the farm. Some time after attaining twenty-one he repudiated the transaction, and began to press William Morley, and Mary, his wife, for payment of his share of his father's estate, which he had already received in point of fact, though apparently an infant. Thereupon William Morley gave him a bond for payment of his share, and William Morley and Mary, his wife, began to sue the plaintiff, Thomas Mawer, in the Court of Exchequer for payment under the bond which had been given by him. Thereupon the plaintiff instituted this suit in equity to restrain the action, and to obtain delivery up of the bond which had been given by him. Now, of the other children who were interested in the intestate's estate, Thomas had died an infant and intestate, and Margaret was still an infant, and was not a party to the suit. The argument is stated in the Registrar's book. It is to be observed that the bill is by the person who gave the bond, to be relieved of it, and the result is thus stated in the Registrar's book: "The court doth declare that the defendant, William, is well paid, and he must deliver up the bond to the other defendant, and give a release and decree the same accordingly." The bond there mentioned is, as I read it, that which had been given by William Morley to the defendant, William Harrison, for payment of his share. Whether that relief, being relief between co-defendants, ought to have been given by the decree may be a question. Then it goes on: "Stay all proceedings at law on the plaintiff's £ 100 bond" — that is a mistake for £ 120, as clearly appears from the previous passage in the Registrar's note, where it is corrected in the margin, but the correction is omitted here, so that all proceedings on the plaintiff's bond were stayed — "till Margaret doth release, and when the plaintiff hath procured Margaret, who is not a party to the action, to release that bond, then that bond to be delivered up," and so forth,

"but then the plaintiff's bond to be at suit for the recovery of Margaret's moiety of £ 120." ¹ So that all that was decided in that action was this: that the plaintiff, who had given his bond of indemnity, was not entitled to have it delivered up to be cancelled till all claims had been settled. Under those circumstances, it appears that the point for which it was cited in 1 Equity Cases. Abridged, could not have been decided in that case; and that at most the reported statement amounts to a *dictum* in the course of the argument. It is now nearly two hundred years since this case was decided, and the sole authorities on a point which must have been of frequent occurrence are these: a *dictum* in 1692, a *dictum* early in the century by Sir William Grant in the year 1805, and what appears to me to be the contrary opinion of Lord Eldon a little later.

Under these circumstances, it seems to me that there is no real authority for the proposition in question; and upon principle I cannot see why a surety who takes from the principal debtor a bond or indemnity at once becomes a trustee of that for the principal creditor. That is really the contention of the plaintiffs. Of course, the other doctrine is well established, — viz., that the surety who pays the debt is entitled to stand in the place of the principal creditor; but the doctrine contended for by the plaintiffs rests entirely on those *dicta* which I have mentioned.

It seems to me, under these circumstances, that I cannot give effect to the contention of the plaintiffs, and that they must simply be left to prove against the estate of the testator for what is due to them, without having the exclusive benefit

¹ The decree was dated the 7th of November, 1692, and the court consisted of two Lords Commissioners, viz., Sir James Astry and Dr. Edisbury. These learned Commissioners were both Masters in Chancery, James Astry having been appointed on the 27th of April, 1683, and John Edisbury on the 13th of May, 1684. See Hadyn's Book of Dignities, p. 240. — REPORTER.

THE STUDY OF CASES.

of these securities in respect of which payments have been made to the estate.¹

Solicitors, *Pilgrim & Phillips; Few & Co.,*
Agents for John James, Wirksworth.

Case 14. — *Callender v. Keystone Mut. L. Ins. Co.*

CALLENDER'S ADMINISTRATOR *v.* THE KEYSTONE MUTUAL LIFE INSURANCE COMPANY.

SUPREME COURT OF PENNSYLVANIA, 1854.

[23 *Pa.* 471.]

ERROR to the Common Pleas of Dauphin County.

This was an action of covenant by Daniel Hartman, administrator of the estate of W. Callender, deceased, on a policy of insurance, issued by the defendants on the life of the plaintiff's intestate, in which he was defeated on the ground of misrepresentations made by the deceased, and judgment was entered in favor of the defendant. See 9 Harris, 466. On this judgment the defendant issued a *fi. fa.* against the plaintiff for the costs to be levied *de bonis propriis*, and on motion, the court below refused to set it aside, and hence this writ of error.

Fisher, for the plaintiff in error. It was admitted that the case of *Ewing v. Furness* sustained the decision below, but insisted that that case is without any support in the cases from which it is supposed to be derived. 11 Ser. & R. 247; 2 Rawle, 180; 8 W. & Ser. 379; 7 Barr, 136; 5 Pa. Law Jour. 511.

Berryhill, contra, relied especially on *Ewing v. Furness* and the other cases reviewed by the plaintiff.

The opinion of the court was delivered by

LOWRIE, J. This case presents the question, Is an administrator plaintiff personally liable to execution for the

¹ See §§ 40-42, 53, 55, 66, 68.

general costs of the cause, on a verdict and general judgment in favor of the defendant?

This question was decided in the affirmative in the court below, and so it was decided in this court in 1850, in the case of *Ewing v. Furness*, 13 State Rep. 531, without anything having been said by the court in vindication of the decision, except that it was "on the authority of several decisions of this court, directly in point."

We have failed to find any such cases, and none are cited before us, as supposed, to contain such a doctrine, except *Show v. Conway*, 7 State Rep. 136; *Muntorf v. Muntorf*, 2 Rawle, 180; *Penrose v. Pawling*, 8 W. & Ser. 380; and these seem to be those alluded to by the court, and we shall look for the rule there.

It is not in *Muntorf v. Muntorf*, for that refers to and approves the case of *Musser v. Good*, 11 Ser. & R. 247, which expressly negatives our present question, and decides only that our rule is different from the English one in this, that the latter gives no costs at all in such cases, while ours gives costs against the assets, and not against the administrator personally.

It is not in *Penrose v. Pawling*, for that decides only that an administrator plaintiff, who received his costs paid by the defendant on an appeal from an award, is personally liable for the costs thus received, if he be finally defeated in the action; and this admits that he is not personally liable for the costs generally. What he had personally received as his costs, to which he was conditionally entitled, he must personally refund on the failure of the condition; to wit, on losing the final judgment. This puts the parties in the final judgment, personally, in the same relative condition that they were in before the suit began, and is equivalent to judgment against the assets for the general costs of the defendant. Such is also the case of *McWilliams v. Hopkins*, 1 Whart. 275.

The case of *Show v. Conway* professes to be founded, in

part, on the two just considered, and therefore it is not inconsistent with them, though the syllabus of it is. The defendant did not recover his costs from the administrator in that case by virtue of the judgment, but under a special decree, founded on testimony specially taken, and showing that the suit was vexatious, and for this reason the decree was affirmed here. This, therefore, is merely the affirmance of another principle of law that makes an administrator plaintiff liable for costs when he is defeated in a wanton and vexatious suit. 7 Wend. 552; 1 Denio, 276; 3 Bos. & Pul. 115; 5 Id. 72; 9 Bing. 754. And hereby our question is implicitly, yet plainly negatived, notwithstanding some loose expressions that seem to cover a broader principle than was demanded by the case.

We find, therefore, no support for *Ewing v. Furness*, and everything against it. And there are other evidences of the law still more abundant and convincing. The old English statutes, giving costs against plaintiffs, have always been construed not to apply as against executors and administrators; and subject to the modification above alluded to, we have followed the law as we got it there. The statute 3 Jac. 1, c. 8, requires bail in error for debt and costs, but this is held not to apply to administrators, plaintiffs in error, because they are not personally liable for either debt or costs. Cro. Jac. 350; 4 Mod. 245. And such, and for the same reason, is the construction of the terms of appeal from an award under our Act of 1810; 5 Binn. 400: and from *Nisi Prius*, 2 State Rep. 404.

The English decisions afterwards received the sanction of Stat. 16 and 17 Car. 2, c. 8, s. 5, which, in requiring bail in error, excepts the case of executors and administrators. And this statute was in force with us until superseded by our more recent statutes to the same effect in the cases of writs of error and appeals of every kind from courts, awards, justices of the peace, and under the Act of 1846, concerning bail and attachment.

But the denial of the principle of *Ewing v. Furness* is much more direct and positive in the statutes that forbid justices of the peace to enter judgment or issue execution against administrators personally (Act of 1810), or that execution issue against them at all where there is a deficiency of assets, and requires that the remedy shall proceed in the Orphans' Court against the estate of the decedent. Act of 1834, concerning executors and administrators. With us, therefore, a general judgment against administrators, whether plaintiffs or defendants, is always against them officially, and to be paid by them out of the assets, and not personally. And such being the judgment, such must be the execution.

Nobody has ever supposed that on a general judgment against a defendant administrator, who has unsuccessfully resisted a claim against the estate, he is personally liable for the costs; and we can see no essential difference in this regard between an unsuccessful prosecution and an unsuccessful resistance of a claim.

Besides this, it is some evidence of what the law is with us, that our sister States, deriving their customs and modes of thinking from the same source, have the same rule, or the old English one; and so we find it in New York, 7 Wend. 522, 4 Cow. 87; New Jersey, 1 Harrison, 210; South Carolina, 2 Ray, 165, 1 Bailey, 79; North Carolina, 1 Murphy, 102; Georgia, Dudley, 1; Kentucky, 2 Littell, 387, 2 J. J. Marsh. 499; Illinois, 3 Scam. 61; Alabama, 7 Ala. 251, 10 Id. 600; and in Ohio by statute. In Massachusetts it is altered by statute.

Surely such an amount of evidence is sufficient to show what the law is, and to satisfy any reasonable man that there is good reason for it, and that the decision in *Ewing v. Furness* is a mistake, and ought not to be followed.

Do we violate the doctrine of *stare decisis* by now correcting the mistake, and going back to the well-established doctrine which that case has disturbed? If we do, we commit

THE STUDY OF CASES.

a greater error than the one we have felt bound to correct ; for that doctrine, though incapable of being expressed by any sharp and rigid definition, and therefore incapable of becoming an institute of positive law, is among the most important principles of good government. But, like all such principles, in its ideal it presents its medial and its extreme aspects, and is approximately defined by the negation of its extremes.

The conservatism that would make the instance of to-day the rule of to-morrow, and thus cast society in the rigid moulds of positive law, in order to get rid of the embarrassing but wholesome diversities of thought and practice that belong to free, rational, and imperfect beings ; and the radicalism that, in ignorance of the laws of human progress and disregard of the rights of others, would lightly esteem all official precedents and general customs that are not measured by its own idiosyncrasies ; each of these extremes always tends to be converted into the other, and both stand rebuked in every volume of our jurisprudence.

And the medial aspect of the doctrine stands everywhere revealed as the only practical one. Not as an arbitrary rule of positive law, attributing to the mere memory of cases higher honor and greater value than belong to the science and natural instinct and common feeling of right ; not as withholding allowance for official fallibility, and for the changing views, pursuits, and customs that are caused by and that indicate an advancing civilization ; not as indurating, and thus deadening the forms that give expression to the living spirit ; not as enforcing "the traditions of the elders," when they "make void the law" in its true sense ; nor as fixing all opinions that have ever been pronounced by official functionaries ; but as yielding to them the respect which their official character demands, and which all good education enjoins.

When the varied surface of this earth is changed into a dead level, and the ocean's waves are still, then man will

need another habitation. And when the variety of human action and development is subjected to judicial and legislative prescriptions, and the rule of man's free and educated reason is proscribed, with all its improving diversities, and all reasoning becomes illegal, if the subject has been already reasoned upon by judges or decided upon by them without reasoning, then man will need another jurisprudence, and another legislation, without, perhaps, being capable of enjoying them.

The doctrine of *stare decisis* is, indeed, one of the most important in the law ; for in its simplicity it expresses man's reverence for civil authority, and the demand of his nature that it shall be obeyed ; and this feeling is the surest foundation of social order. It is the expression of the people's expectation that all government shall be administered with great care and with a reasonable degree of consistency, and of their confidence that it is so ; and it involves the injunction that official functionaries shall not for light reasons abandon the expressed judgments of themselves or of their predecessors, especially if any serious embarrassment of public order may be the consequence. It regards all governmental, and especially judicial decisions, as the official representations of the public will in relation to civil rights and duties, and as being entitled to respect and reverence for this simple reason. To these feelings and principles we owe official reverence, and we desire to cherish it as a necessary element of social order and of judicial character.

We do not violate it when we declare that a decision made four years ago in opposition to all previous legislation and jurisprudence, is open to correction. We should violate it by declaring that decision to be conclusive evidence of the law, and should at the same time announce a judicial heresy, involving the assertion that judicial decisions are equivalent to positive law, and that courts not only apply the law, but make it. And how palpable would appear the violation,

THE STUDY OF CASES.

when it should be noticed that the case which we establish is without any and against all precedent !

If it should be said that the principle of the decision in *Ewing v. Furness* has entered into the customs and practice of the country, then the claim that it should stand as law would be founded upon a different principle, expressed in the maxim *communis error facit jus*. If such a custom has arisen in this instance, it has had but a short life, and secured but a frail title to perpetuity. And surely the fact that subordinate courts and officers may have been misled by the decision in some unknown instances in the application of the law, can have no influence in converting the error into a rule of right. Official customs affect not usually rights themselves, but the means of securing them.

The case of *Ewing v. Furness* must be regarded as a divergence from the beaten path of the law, and we cannot help to clear a new track in that direction. It is a plain error, and it is not our duty to set the stain that mischance has dropped upon the law. The case before us, having followed its lead, must be reversed. The judgment is against the estate of the decedent, and so must the execution be.

September 13, 1854. This cause came on to be heard at the late term of this court, at Harrisburg, on a writ of error to the Court of Common Pleas of Dauphin County, and was argued by counsel, and now, on mature deliberation, it is considered and adjudged, that there is error in the execution, in that the same issued against the plaintiff, to be levied out of his own effects, when it ought to have been in the form directed by law against the assets in his hands as administrator ; and therefore the said execution is set aside at the costs of the defendants in error, and the cause is remanded to the said Court of Common Pleas.

BLACK, C. J., and KNOX, J., dissented.¹

¹ See §§ 17, 27, 51, 53, 58, 66, 74-78, 85-97.

Compare *Gifford v. Livingston*, 2 Denio, 380 (1845); *Aud v. Ma-*

TOWLE v. FORNEY.

Case 15. — Towle v. Forney.

TOWLE v. FORNEY.

COURT OF APPEALS OF NEW YORK, 1856.

[14 N. Y. 423.]

ACTION in the superior court of the city of New York to recover two lots of land. The plaintiff had a verdict and judgment. On appeal by the defendant, the judgment was affirmed at a general term of the Superior Court. (For a statement of the case and the reasons for the decision, see 4 Duer, 164.) The defendant appealed to this court, where the case was submitted on printed arguments, by *D. D. Field*, for the appellant; *N. Dane Ellingwood*, for the respondent.

DENIO, C. J. The plaintiff's counsel maintains that the questions of law involved in this case have been conclusively settled in his favor in the courts of this State. In *Clarke v. Van Surley* (15 Wend. 436), the plaintiff, one of the children of Thomas B. Clarke, brought ejectment for a portion of the Chelsea farm, claiming title under the will of Mary Clarke, against the defendant, who held under a deed executed on the second day of August, 1821, by T. B. Clarke to one George De Grasse. The will of Mrs. Clarke, the several acts of the Legislature, and the proceedings in the court of chancery, which were given in evidence in the case now under consideration, are the same which were relied upon by the defendant in the case referred to; and the only difference favorable to the present defendant, if any exists between the two cases, relates to the consideration upon which the deeds from T. B. Clarke were executed. The deed to De Grasse purported to be for the considera-

gruder, 10 Cal. 282 (1858); *Harrow v. Myers*, 29 Ind. 469 (1868). See H. C. Black, "The Principle of Stare Decisis," 25 Am. L. Reg. n. s. 745 (1886).

THE STUDY OF CASES.

tion of \$2,000, and professed to convey thirty-nine lots, and there was no proof respecting the actual consideration, nor was there anything in the terms of the conveyance to show that De Grasse was a creditor of Clarke. The deed under which the present plaintiff claims recites that Clarke was indebted to the grantee in a large sum of money. The grant is stated to be made in consideration of the premises and of \$3,750 paid by the grantee to the grantor. Besides, there was proof in this case as to the actual consideration. The conveyance was made in part for cash, secured to be paid to Clarke by the bonds of the purchaser, and which was afterwards actually paid, and in part to pay for board and other necessities furnished to Clarke's family. There is another discrepancy between the two deeds, which is either immaterial or favorable to the present plaintiff. The one to De Grasse was not approved by a master in chancery until many years after it was given, and after the death of Clarke, while the conveyance to McIntyre, upon which the plaintiff's title in this case depends, was approved by a master, as to "manner and form," at the time it was executed. The Supreme Court, in *Clarke v. Van Surloy*, held the deed to De Grasse to be a valid conveyance, sufficient in law to pass the title which Mrs. Clarke, the testatrix, had at the time of her death, and to bar the claims of the children of T. B. Clarke, the devisees in remainder. The case was brought before the Court for the Correction of Errors, on appeal, and is reported in that court, under the name of *Cochran v. Van Surloy*, in 20 Wend. 365. The judgment of the Supreme Court was affirmed. Assuming, for the present, that the discrepancies which I have referred to are immaterial, the judgment of the court of errors is a determination of the court of last resort in this State, not only upon all the questions of law in the case under consideration, but upon the identical title under which the plaintiff in the reported case and the defendant in the present case claimed to own the

premises in controversy in the respective suits. Theoretically, the judgments of courts are only evidence, more or less authentic, of the law, and not the law itself; and it is unhappily true that cases sometimes occur where a prior judgment upon the same legal question cannot be conscientiously followed, after the principle has received a further and more deliberate examination. The cases, however, are extremely rare in which the determination of the highest appellate court can be properly departed from, when the same legal question again arises before a court of the same government. If it shall be thought that an erroneous rule has been established by the adjudication relied on as a precedent, it is better that it should be changed by the Legislature by an act which cannot retrospect, than that the courts should overturn what they have themselves established, and thus disappoint all who have acted upon the rule which had been considered settled. If this is so where an abstract rule of law, determined in a prior case, is sought to be applied to new facts, the reason is stronger where, as in this case, a series of particular acts has been passed upon and held to produce a given legal result, and the same identical facts are again before the court between other parties. In such a case, there being no pretence of collusion, and no reason to impute carelessness or inattention to the judges, the determination should be considered final and conclusive upon all persons in interest or who may become interested in the question, as well as upon the parties to the particular action. The present case affords forcible illustration of the importance of this doctrine.

Here was a large number of building lots which Clarke, *prima facie*, was authorized to sell, and a large proportion of which, if not all of them, he actually did sell. The number, in one of the documents contained in the printed case, rose as high as 189. A question arises relating to the title to one of them. It depends exclusively upon the effect of written

THE STUDY OF CASES.

documents, acts of the Legislature, and the records of the courts. It is earnestly litigated, and is carried through all the courts, and is finally decided in the tribunal of ultimate appeal. Nearly twenty years afterward the title thus established in respect to one of the lots is again questioned in regard to another of them. It may have been purchased upon the faith of the prior decision, or have been forced upon the party now claiming it by the judgment of a subordinate tribunal, acting in obedience to the rule established by the prior decision. The latter was the case here. If the question is still open to discussion and liable to be determined the other way, the reports of adjudged cases will operate as a snare rather than a safe guide. I am of opinion that we ought not to re-examine the grounds of the decision in the case of *Cochran v. Van Surlay*; but to regard it as a settled principle that T. B. Clarke had, under the statutes and orders given in evidence, the right to sell the premises in controversy in this case, and that the purchaser was not bound to see that the proceeds of the sale were applied to the benefit of the devisees in remainder.

There is no difference in principle between the two cases. In *Cochran v. Van Surlay* it was assumed that the sale was for cash paid. The order of July 3, 1815, which was applicable to that sale, authorized Clarke, under the direction of a master in chancery, to apply the proceeds of the sale, or so much thereof as might be necessary, to the payment of Clarke's debts then owing and to be contracted, for the necessary purposes of his family. The authority was to sell the lots to raise money to pay debts which Clarke had incurred or might incur for the support of his family; and the sale and conveyance made under that authority was held to be effectual to pass the title. The deed to McIntyre was executed in part upon the consideration of money paid, and so far was precisely like the one to De Grasse. As to the rest, the conveyance was made in the performance of a bar-

gain whereby the grantee was to furnish board and other necessities to Clarke and his children, and to have in payment thereof a conveyance of the land. There was no absolute existing debt for which the land was conveyed in satisfaction. The board and other necessities were advanced by McIntyre as a payment of the consideration for which the land was sold. According to the adjudged case, Clarke could lawfully sell the land to raise money to pay debts incurred for necessities for his family which he should procure on credit. The sale in controversy in this case was to the party who furnished such necessities, specifically and in payment therefor. I am unable to perceive any solid distinction between the cases.

In *Cochran v. Van Surlay*, it was decided that the master's approval of the transaction applied only to sales in satisfaction of existing debts. In that case the only act of a master was the indorsement of his approval of the deed many years after it was executed. This, of course, was of no consequence if the order required the sale to be authorized by the master before it should take place. In the present case, it may well be doubted whether the certificate indorsed upon the deed, importing that it was approved of as to manner and form, was the act contemplated by the order. It seems clear to me that the design was that the master should pass upon the propriety of the sale in reference to all the circumstances bearing upon that question, and that the certificate ought to import the exercise of that judgment. If the question were *res nova*, I should adopt the construction which would require the concurrence of the master in all cases of a disposition of land under the orders of the chancellor. But a more restricted meaning has been given to the paper, and, for the reasons before mentioned, I think we are not at liberty to review that decision. The deed to McIntyre was not a conveyance in satisfaction of a debt of Clarke, and the sale, of which it was

THE STUDY OF CASES.

the evidence, did not, therefore, require the approbation of a master in chancery.

We have been referred, by the defendant's counsel, to the cases decided in the Supreme Court of the United States upon the title derived under T. B. Clarke, in which the case of *Cochran v. Van Surley* has not been followed, and we are asked to adopt the conclusions of that court in opposition to the judgment of the court of errors in this State. *Williamson v. Berry*, 8 How. 495 ; *The Same v. Irish Presbyterian Congregation*, id. 565 ; *The Same v. Ball*, id. 56. It would be enough to say of the first and principal case, that it was shown positively that the deed of Clarke, which was the foundation of the title set up, was given, in part, for a consideration not authorized by the order, to wit, other lands situated in Pennsylvania and Virginia, which had been purchased at sales for taxes ; but the more suitable answer is that, as between the judgments of our own courts and those of the general government, where there is a conflict between them, we ought to follow our own decisions, except in cases arising under the Constitution and laws of the Union, where the judgments of the Supreme Court of the United States are of controlling authority. In cases in which the Federal courts acquire jurisdiction of controversies, on account of the character or residence of the parties, such courts assume to administer the law of the State in which the matter arose, and, where the action relates to the title to real estate, the law of the State within which the real estate is situated. Thus, the legal rules of property existing in New York are those prescribed by the laws of New York, and such laws are the same whether they are administered by the courts of the State or by the courts of the nation. There is no national code or system of laws respecting private property. The dispensing of private justice between individuals is in general a matter of State concern. It is only in a few exceptional cases that the courts of the United

States can be called upon to act. Where the United States, as a political corporation, is the plaintiff, where an alien is a party, and where the action is between the citizen of a State within which the action is brought, and a citizen of another State, concurrent jurisdiction is, from motives of policy and convenience, conferred upon the Federal courts. Judicial Act, § 11; 1 Story's Laws, 57. In these exceptional cases, of comparatively unfrequent occurrence, the general government undertakes, through its courts, to administer the State laws. As evidence of these laws, it, of course, receives the State Constitutions and statutes, and the adjudications of the State courts. If a question is found to have been settled by the highest appellate court of a State, that decision is binding upon the courts of the United States to the same extent as upon the courts of the State in which it was made. We have already shown that the judgment of the court of errors, in *Cochran v. Van Surlay*, established the authority of T. B. Clarke to sell and convey the land in question. If we are right in that, it follows that the Supreme Court of the United States fell into an error in denying to his conveyance the effect to which it was entitled. Upon such a question as this the highest court of the Union has no legal pre-eminence over any of the courts of this State. We listen to the views of its judges with the respect to which their eminent character and high position entitle them, but in inquiring what the law of this State upon a particular question is, we must look primarily to the judgments of our own tribunals, and when we find the point well settled by the decision of the highest State court, we cannot do otherwise than follow that decision, notwithstanding the Supreme Court of the United States has taken a different view of the matter. The able dissenting opinion of Mr. Justice Nelson in *Williamson v. Berry* contains a reference to the cases in that court, where the views which we have expressed upon this question have been often affirmed.

THE STUDY OF CASES.

Upon the whole case I am of opinion that the judgment of the Superior Court should be affirmed.

SELDEN, J., dissented.

*Judgment affirmed.*¹

Case 16. — Gelpcke v. Dubuque.

GELPCKE v. CITY OF DUBUQUE.

SUPREME COURT OF THE UNITED STATES, DECEMBER
TERM, 1863.

[1 Wall. 175.]

THE Constitution of the State of Iowa, adopted in 1846, contains the following provisions, to wit: —

“ART. 1. § 6. All laws of a general nature shall have a uniform operation.”

“ART. 3. § 1. The legislative authority of the State shall be vested in a Senate and House of Representatives, which shall be designated the General Assembly of the State of Iowa,” &c.

“ART. 7. The General Assembly shall not in any manner create any debt or debts, liability or liabilities, which shall, singly or in the aggregate, with any previous debts or liabilities, exceed the sum of one hundred thousand dollars, except in case of war, to repel invasion, or suppress insurrection.”

“ART. 8. § 2. Corporations shall not be created in this State by special laws, except for political or municipal purposes; but the General Assembly shall provide, by general laws, for the organization of all other corporations, except corporations with banking privileges, the creation of which is prohibited. The stockholders shall be subject to such liabilities and restrictions as shall be provided by law. The State shall not directly or indirectly become a stockholder in any corporation.”

¹ See §§ 85-97.

With these constitutional provisions in existence and force, the Legislature passed certain statutes. One — incorporating the city of Dubuque, passed February 24, 1847 — provided in its 27th section, as follows: —

“That whenever, in the opinion of the City Council, it is expedient to borrow money for any particular purpose, the question shall be submitted to the citizens of Dubuque, the nature and object of the loan shall be stated, and a day fixed for the electors of said city to express their wishes; the like notice shall be given as in cases of election, and the loan shall not be made unless two-thirds of all the votes polled at such election shall be given in the affirmative.”

By an Act passed January 8, 1851, this charter was “so amended as to empower the City Councils to levy annually a special tax to pay interest on such loans as are authorized by the 27th section of said Act;” that is to say, by the section just quoted. A subsequent Act, — one passed 28th January, 1857, — enacts thus: —

“The city of Dubuque is hereby authorized and empowered to aid in the construction of the Dubuque Western, and Dubuque, St. Peter’s and St. Paul Railroad Companies, by issuing \$250,000 of city bonds to each, in pursuance of a vote of the citizens of said city, taken in the month of December, A. D. 1856. Said bonds shall be legal and valid, and the City Council is authorized and required to levy a special tax to meet the principal and interest of said bonds, in case it shall become necessary from the failure of funds from other sources.”

“The proclamation, the vote, bonds issued or to be issued, are hereby declared valid, and the said railroad companies are hereby authorized to expend the moneys arising from the sale of said bonds, without the limits of the city and county of Dubuque, in the construction of either of said roads; and

THE STUDY OF CASES.

neither the city of Dubuque nor any of the citizens shall ever be allowed to plead that the said bonds are invalid "

With this Constitution, as already mentioned, in force, and after the incorporation of the city and the passage of Acts of Assembly, as just mentioned, — and after certain decisions of the Supreme Court of Iowa as to the constitutionality of these Acts, the character and value of which decisions make the principal subject of discussion in this case, — the city of Dubuque issued a large amount of coupon bonds which were now in the hands of the plaintiffs. The bonds bore date on the 1st of July, 1857, and were payable to Edward Langworthy, or bearer, on the 1st of January, 1877, at the Metropolitan Bank in the city of New York. The coupons were for the successive half year's interest accruing on the bonds respectively, and were payable at the same place. The bonds recited that they were given "for and in consideration" of stock of the Dubuque Western Railroad Company, — (one of the roads to which, by the Act last mentioned, the city was authorized to subscribe), — and that for the due payment of their principal and interest, "the said city is hereby pledged, in accordance with the code of Iowa, and an Act of the General Assembly of the State of Iowa, of January 28, 1857," — the Act just referred to. The coupons on the bonds not being paid, the plaintiffs sued the city of Dubuque in the District Court of the United States for the District of Iowa, claiming to recover the amount specified in the coupons, with the New York rate of interest from the time of their maturity, and exchange on the city of New York.

The city set up the following grounds of defence : —

1. That the bonds were issued by the city to aid in the construction of a railroad extending beyond its limits into the interior of the State.
2. That at the time of issuing the bonds and coupons, the

indebtedness of the city exceeded one hundred thousand dollars.

3. That at the time of issuing the bonds and coupons, the indebtedness of the State of Iowa exceeded one hundred thousand dollars.

4. That at the time of issuing the bonds and coupons the indebtedness of the cities and counties of Iowa exceeded, in the aggregate, one hundred thousand dollars.

The plaintiffs demurred. The demurrer was overruled, and judgment entered for the defendant. On error, the question in this court was, whether the judgment had been rightly given.

Mr. *S. V. White* and Mr. *Allison* for the bondholders : In one point of view, the question before the court is a narrow one ; a question as to the number and relative weight of decisions of the Supreme Court of Iowa alone, and in its own constitution and statutes ; a settlement of the balance on an account domestic simply. It is a question whether this court will regard seven solemn decisions, made by the Supreme Court of Iowa, beginning in A. D. 1853, and ending in A. D. 1859, on the faith of which decisions, strangers have lent their money for the improvement of the State itself, or of cities which adorn and enrich it, so overruled by a decision made in A. D. 1860, or decisions of a later date, as that bonds issued payable to bearer are now void in the hands of bearers who, between the said years of 1853 and 1859, and on the faith of those decisions, bought them in good faith and for value. Undoubtedly we shall ask that this question be decided ; that this settlement of the account domestic simply be settled. The case involves as a necessity, perhaps no other question. The court may possibly confine itself much to these limits. In some points of view, however, the issue is of greater dignity. It concerns the honor, not of Iowa only, but of all the States ; the value of millions of securities issued by nearly every State of the Union, and

THE STUDY OF CASES.

by cities and counties and boroughs in them all. Yet, more : we shall ask this court to treat as contradicting precedents made by the Supreme Court of Iowa itself, and so as subversive of regard for authority, — as erroneous, therefore, in the law and of no obligation, — the latest decisions of a State of this Union ; the decision, we mean, in *The State of Iowa, ex relatione, v. The County of Wapello*, 13 Iowa, 388, and any decisions which, to the disregard of earlier and settled precedents, follow it. On all these accounts the subject deserves an examination on a wider view of precedents than those of Iowa alone. Time is not wasted in appropriating much of it to an inquiry as to American decisions universally. We propose therefore to examine —

1. The adjudications of courts of the different States upon the same or similar questions, prior to its adjudication by the courts of Iowa.

2. The adjudications of the courts of the State of Iowa, upon such questions ; and,

3. The adjudications of the courts of the United States, and of the several States, since the question was first decided by the courts of Iowa.

1. And first we may admit that all courts have held uniformly, that such Acts and contracts as those to be considered in this case do not arise from any legislative power delegated to the municipal corporations, but that they arise only from powers conferred by legislative Act of the State.

The first case upon the subject arose in Virginia, and was decided by the Court of Appeals of that State, A. D. 1837, in *Goddin v. Crump*, 8 Leigh, 120. The Legislature of that State had authorized the city of Richmond to subscribe for stock in a company incorporated for the improvement of the navigation of James River, and for building a road to the Falls of the Kanawha River, and to borrow money to pay the same, and to levy and collect a tax for the payment of principal and interest so borrowed. Under these Acts the

Common Council of the city of Richmond passed an ordinance subscribing for such stock, and for levying a tax, as authorized by such Acts, and the collector of the city had levied upon a slave, the property of complainant, to satisfy the tax due from him under such levy. The complainant exhibited his bill in equity, in behalf of himself and others, citizens of the city of Richmond, who were property-holders therein, and who had not consented to the passage of the Acts of the Legislature, nor the Acts of the council in passing the ordinance and in levying the tax, and prayed to be relieved from the payment of such tax; and that the collector, who, with the Common Council of Richmond, was made a party defendant, might be enjoined and restrained from the collection of such tax, perpetually; upon the ground that the law authorizing such subscription and levy was unconstitutional and void.

Upon this case the Court of Appeals of Virginia (Brooke, J., dissenting) decided:—

I. That an Act, to be within the legitimate scope of a municipal corporation, need not be performed in the corporate limits, but might properly be extended to objects beyond the limits of the corporation.

II. That the true test of the corporate character of the Act, was the interest of the corporation.

III. That the citizens themselves were the judges of what was the interest of the corporation, and not the judges of the court, and however much a court might doubt the wisdom of the citizens in determining that question, they would not interfere with it.

IV. That the majority of such citizens could bind a dissenting minority, and properly charge them and their property with the payment of tax, to which they had given no assent.

V. That the laws in question are not repugnant to the Constitution, and the bill was accordingly dismissed with costs.

THE STUDY OF CASES.

The next case in point arose, A. D. 1843, before the Supreme Court of Errors of the State of Connecticut, *City of Bridgeport v. Housatonic R. R. Co.*, 15 Connecticut, 475. In that case, in March, 1837, the city of Bridgeport voted to take stock in the Housatonic Railroad Company, and to procure loans of money, pledging the faith of the city therefor. In May, 1838, the Legislature confirmed and legalized such Acts; and on June 15th, 1838, the bonds sued on were duly issued. The court unanimously decided: —

I. The Legislature can give power to municipal corporations to subscribe stock in railroads passing through or terminating in them ;

II. That the Legislature may, by Act or Resolution, confirm and render valid, prior voidable acts of such corporations ;

III. That the fact of a municipal corporation becoming stockholders in a railroad, and therefore *pro tanto* going beyond the legitimate ends for which the corporation was constructed, is only an incident to the general power to provide for the interests of the citizens of the corporation, and does not, therefore, take it out of the scope of its corporate Acts ;

IV. That a majority of such citizens can constitutionally decide upon the Acts of the corporation, and compel a minority to contribute by taxation, to objects to which such minority are opposed.

The next case was in the Supreme Court of Tennessee, *Nichol v. Mayor of Nashville*, 9 Humphreys, 252, December Term, A. D. 1848. The Legislature of Tennessee had incorporated a railroad company, and by subsequent Act the town of Nashville was authorized to subscribe 20,000 shares of its stock, and to borrow money, and to levy taxes to pay principal and interest on such loan. A bill was filed in equity to enjoin the borrowing of money under said Act, and to prevent the issue of bonds and the levy of a tax, the ground

assigned being, the Acts were unconstitutional and void. Demurrer to bill. The court decide : —

I. That the building of a railroad or aiding therein, by subscription to the stock, which railroad shall terminate in, or pass through or near a municipal corporation, is within the legitimate scope of corporate Acts, and for such purposes a tax may be levied and collected by the delegated authorities of such corporation ;

II. That such Act neither contravenes the provisions of the Constitution of the United States, nor of the State of Tennessee.

The same questions came before the Court of Appeals in Kentucky, in *Talbot v. Dent*, 9 B. Monroe, 526, A. D. 1849, and again, A. D. 1852, in *Slack v. Maysville R. R. Co.*, 13 Id. 1.

The Chief Justice delivered the opinion of the court in both cases, and in both, the foregoing decisions of Virginia, Connecticut, and Tennessee were cited, argued, approved, and followed at length.

The same questions came before the Supreme Court of Pennsylvania, in *The Commonwealth v. McWilliams*, 11 Pennsylvania State, 61, May Term, 1849, and again in *Sharpless v. Mayor*, 21 Id. 147, and in *Moers v. City of Reading*, Id. 188. All these cases decide the questions as former and other courts had done, and hold the bonds binding.

The Supreme Court of Illinois, A. D. 1849, *Shaw v. Dennis*, 5 Gilman, 405, held an Act of the Legislature, giving the right of taxation to a certain precinct to keep up a bridge across Rock River, to be constitutional, and sustained a tax levied by the local authorities under such law ; and the Supreme Court of New York, *Thomas v. Leland*, 24 Wendell, 65, May Term, 1840, made a similar ruling in behalf of a law authorizing a municipal tax, for the purpose of paying the excess of expenses for bringing a canal to such corpora-

THE STUDY OF CASES.

tion, although private individuals had given bond for the payment of such excess to the canal company.

The same questions came before the Supreme Court of Ohio, A. D. 1852, and A. D. 1853, in two cases, *Cincinnati R. R. Co. v. Commissioners of Clinton County*, 1 Ohio State, 77, and *Cass v. Dillon*, 2 Id. 607, in which the questions were decided as in all the cases already named. Comment may therefore be spared.

Thus there had then been decisions of the highest appellate courts of eight States of the Union, extending through a period of sixteen years, and numbering in all twelve such decisions.

2. As respects the Courts of Iowa. And here we premise, that so far as cities are concerned, there has never been a decision made upon the question in Iowa, but the principle has been repeatedly settled in the case of counties, upon principles, however, equally binding upon cities.

The question came before the Supreme Court of Iowa, at the June Term, 1853, in the case of *Dubuque Co. v. Dubuque and Pacific R. R. Co.*, 4 G. Greene, 1, and the court held : —

I. That a county has the constitutional right to aid in building a railroad within its limits.

II. That the provision of the Constitution, which limited the State debts to the sum of \$100,000, and also the provision which declares that the State shall not directly nor indirectly become a stockholder in any corporation, applied only to the State in its sovereign capacity.

III. That § 114 of the Code of 1851 applied as well to railroads as to ordinary roads, and that proceedings regularly had, under that and subsequent sections, to § 124 inclusive, were regular and legal, and authorized the issue of bonds for railroad purposes, and that said railroad bonds were valid and binding upon the county. This opinion is written by Greene, J. ; Kinney, J., dissenting.

At the June Term, 1854, in *The State v. Bissell*, 4 G. Greene, 328, the same question was raised, together with minor questions about the regularity of the proceedings. It was a proceeding in Chancery, to prohibit the county judge of Cedar County from issuing bonds to a certain railroad company. The county judge in response set out his action in the premises, to which the relators filed a demurrer, which was sustained by the court below, and the defendant prohibited from levying the tax by perpetual injunction. From this decree the defendant, the county judge, appealed, and the case was heard in the Supreme Court, the decree reversed, and the county judge permitted to issue bonds and levy and collect a tax therefor. In this case the opinion was written by Hall, J., and the decision last but one cited is followed without comment. Although Greene, J., dissented on a minor question, growing out of the facts in the case, there was no dissenting opinion on the constitutionality of the bonds.

Next in order, in the course of the history of this question, in the State of Iowa, are two Acts of the Legislature of the State, passed at the session of December, A. D. 1854, both approved January 28th, 1855, Chap. 128 and 146, of Acts of Fifth General Assembly of the State of Iowa, 142 and 219, respectively.

By the first of these it is enacted, "That wherever any [railway] company shall have received, or may hereafter receive, the bonds of any city or county upon subscription of stock, by such city or county, such bonds may have interest at any rate not exceeding ten per cent., and may be sold by the company, at such discount as may be deemed expedient."

By the second it is enacted, "that in all cases where county or town or city incorporations have or may hereafter become stockholders in railroads, or other private companies or incorporations, it shall not be lawful for the county judges, mayors, or other agents of such cities or counties,

THE STUDY OF CASES.

to issue the bonds of their counties, or cities, until they are satisfied that the contemplated improvements will be constructed through or to their respective cities or counties, within thirty-six months from the issuing and delivery of said bonds; and the proceeds of such bonds shall, in all cases be expended within the limits of the county in which said city may be situated; Provided, that nothing in this Act shall in any way affect corporation rights, or any contracts or subscriptions heretofore made with any railroad company or corporation, for the issuing of county corporation bonds."

These Acts show the construction of the State authorities at that time, and are themselves a legislative acknowledgment that under prior laws such municipal corporations had the right to issue bonds to railroads and to take stock in them, and afforded general authority of law for such actions on the part of such corporations in future.

The next case that came before the Supreme Court of the State, was that of *Clapp v. The County of Cedar*, 5 Iowa, 15, a suit brought on the same bonds, the issue of which was sought to be enjoined in the case of *The State v. Bissell*, and was determined before the court at the June Term, A. D. 1857, by a court composed entirely of different judges from those on the bench when the last cause was decided. In that case the majority of the court hold:—

I. That the question of the constitutionality of the bonds is decided by the prior decisions, upon which the public and the world have acted, and that a change of ruling would be "the worst of all repudiation, — judicial repudiation."

II. That such bonds and coupons were negotiable as under the law merchant.

Other questions foreign to this subject were also discussed, but it is unnecessary to refer to them. Wright, C. J., dissented, to use his own words "very reluctantly," on the question of the constitutionality of such bonds.

The question again was decided three times at the June

Term, 1858, in *Ring v. The County of Johnson*, 6 Iowa, 265, in *McMillen v. Boyles*, Id. 304, and in *McMillen v. The County Judge and Treasurer of Lee County*, Id. 391. The opinions in the first two cases were written by Woodward (Wright, C. J., dissenting in the first case); in the second case no one dissented; and the opinion in the third case was written by Wright, former dissenting judge. Each case holds,

I. That the question is settled by the Supreme Court by former adjudications, that the counties have the right, constitutionally, to take stock in a railroad, and to issue their bonds therefor.

II. And the second and third cases decide that the Legislature by a curative Act had made the bonds of Lee County binding upon the county, although from an informality they were irregularly issued.

In one of the cases, *Ring v. The County of Johnson*, 6 Id. 265, which was decided a few days before the others, Chief Justice Wright wrote a short dissenting opinion.

Next in order in the decisions of this question comes *Games v. Robb*, 8 Id. 193, June Term, 1859, and the opinion is here written by Chief Justice Wright, who says: "That the Judge had the power to submit a vote to take subscription on a railroad, to the people, and to levy a tax therefor, we understand to be settled in favor of the power by the cases of *Clapp v. Cedar County*, 5 Id. 15, *Ring v. The County of Johnson*, 6 Id. 265, and *McMillen v. Boyles*, 6 Id. 304, and the cases there referred to." Thus, all the judges concur, in the decision of this question, as they did in *McMillen v. Boyles*, holding the constitutionality of the bonds to be decided by the former cases, the opinion of the court being, in each case, written by the learned judge who alone had dissented.

We thus have the decisions of the Supreme Court of Iowa, given to the world through a period of six years, by

two different benches, in seven different decisions of the court, upon the questions now made before this court, and although two judges had dissented during that time, yet in the opinion of the Chief Justice of the State, written by him who alone had before that time "very reluctantly" dissented, the great commercial world, whose money was at that very moment building up the commerce of the State by extending railroads through it, were assured that the question was settled, and that, too, in favor of the legality and negotiability of these bonds. Whether, in view of the Constitution of Iowa, it was or was not rightly settled in the first instance, is a matter not important at all to inquire into. It was settled by a tribunal which had power to settle it; and on the faith of judicial decisions the bonds were sold.

Before examining decisions since made by the Supreme Court of Iowa, let us mention the decisions of other courts, down to the date when, at December Term, 1859, the Supreme Court just named took that first step, in *Stokes v. The County of Scott*, in overthrowing its decision, which was consummated in *The State, ex relatione, v. The County of Wapello*, at the June Term, 1862.

In Ohio, the Supreme Court, at different dates, has affirmed its ruling in five different decisions, *Ohio v. Commissioners of Clinton*, 6 Ohio State, 280; *The State v. Van Horne*, 7 Id. 327; *Id. v. Trustees of Union*, 8 Id. 394; *Id. v. Commissioners of Hancock*, 12 Id. 596; *Trustees v. Shoemaker*, 12 Id. 624. In Missouri, its court followed, in 1856, previous rulings also, *City v. Alexander*, 23 Missouri, 483. In this the Supreme Court of the United States, the question was decided twice at December Term, 1858, and once in 1859, and once in 1860, *Commissioners of Knox Co. v. Aspinwall*, 21 Howard, 539; *Same v. Wallace*, Id. 547; *Zabriskie v. The Cleveland R. R.*, 23 Id. 381; *Amey v. The Mayor*, 24 Id. 365; *Commissioners, &c. v. Aspinwall*, Id. 376.

The District Court of the United States for the District of Wisconsin, in A. D. 1861, made similar decisions, in *Smith v. Milwaukee & Superior R. R. Co.*, 9 American Law Register, 655, and *Mygatt v. City of Green Bay*, 8 Id. 271.

The Supreme Court of New York, at June Term, 1857, in *Clarke v. The City of Rochester*, 24 Barbour, 446, in a review of the question, after an elaborate argument before them, made the same ruling, which was affirmed by the Court of Appeals of that State at the September Term, 1858, *nemine dissente*, *Bank of Rome v. Village of Rome*, 18 New York, 38.

The Supreme Court of Indiana, at the May Term, 1857, *The City of Aurora v. West*, 9 Indiana, 74, made the same ruling.

The Supreme Court of Illinois made a similar ruling, in April Term, 1858, *Prettyman v. Supervisors*, 19 Illinois, 406, which was, in April Term, 1860, affirmed in two cases, *Johnson v. The County*, 24 Id. 75; *Perkins v. Lewis*, Id. 208.

The same question after elaborate discussion was also unanimously decided in the same way, at the January Term, 1857, of the Court of Appeals of South Carolina, *Copes v. Charleston*, 10 Richardson, 491.

The Supreme Court of Wisconsin, at the December Term, 1859, in the two cases, *Clark v. City*, 10 Wisconsin, 136, and *Bushnell v. Beloit*, Id. 195, made the same ruling, and decided every constitutional question in this case under a Constitution the same as that of the State of Iowa, in favor of the legality of such bonds; and that, too, by the unanimous concurrence of the whole bench. There are other cases, in others of the States of the Union, which might be cited, but it would only tend to lengthen the list, rather than to make it stronger.

Nowhere, in short, can an authority be found, save the subsequent ruling of the State of Iowa, where the highest appellate court of a State, or of the United States, has held

THE STUDY OF CASES.

such bonds to be invalid, in the hands of *bonâ fide* holders for value ; and at the time when that decision was rendered, decisions had been made by the Supreme Court of the United States, and of fifteen of the different States of the Union, of which Iowa was one, running through a quarter of a century of time and all going to establish the obligation.

But upon what grounds was this contrariant decision finally based?

In *Stokes v. The County of Scott*, 10 Iowa, 166, the majority of the court held, where the bonds had been negotiated, and rights had become vested by purchase, by innocent holders, that there they were valid ; but that where the question was presented prior to the issue of such bonds, the court might properly interfere to restrain the issue. Wright, C. J., took his former position, holding such bonds to be unconstitutional and void in the hands of all parties. Stockton, J., held the bonds constitutional, but not warranted by law ; that they might be enforced by innocent third parties, but that it was properly within the province of a court of equity to restrain the issue thereof, where the question was presented *in limine*.

Woodward, J., dissented from both the other judges, holding that the question was settled in the State, and that it was the duty of the court to abide by precedents.

Of the immediate effect of this decision, the world had no right to complain, as no money had been invested, and it was only so far as it tended to cast loose from the accepted decisions of the State of Iowa, and of other States, and to render vested rights insecure, that it tended to work a hardship upon the commercial world.

We come now to *The State of Iowa, ex relatione, v. The County of Wapello*, June Term, 1862. The court there decided : —

I. That section 114 of the Code of 1851, did not afford the authority of law for issuing of county bonds, overruling

the case of 1853, — Dubuque County v. Dubuque and Pacific Railroad Co.

II. That certain statutes relied on did not afford such authority, nor legalize such Acts already performed : but —

III. That if a constitutional question did not preclude it, the court would feel bound by the construction of the statute by former courts, and would follow such decisions.

IV. That such a law, however passed, would not confer the authority, because unconstitutional.

[The counsel then examined this case on principle, arguing that independently of precedents it was wrongly decided.]

Now in the face of this history of decisions in Iowa and everywhere, of what value is this case, *The State of Iowa, ex rel., v. The County of Wapello*, so much relied on? By whom, after all, is law to be settled among us? By the Supreme Court of the United States, or of the State of Iowa? By the supreme tribunal of fifteen States or of one? By the Supreme Court of Iowa for seven years or for two? By six judges of that State or by three? Are you to hold, in the face of the fact that millions of dollars have been invested, under the law which enters into and forms a part of every contract as it was interpreted by the courts of the whole country, that you yourselves were mistaken? That for twenty-five years all the tribunals of the whole country were mistaken? That for seven years the Supreme Court of Iowa was mistaken, because it appears now that that tribunal has reversed its long-established rulings? Had the question been presented to you one year ago to-day, you would not have hesitated an hour on the proposition, for then there was no diversity of rulings anywhere. Because the Supreme Court of Iowa has chosen thus to disregard its own precedents, are millions of property, treasured on the banks of the Delaware, the Hudson, the Thames, the Seine, and the Rhine ; are the decisions of this State of Iowa itself, as of all

THE STUDY OF CASES.

the States ; the reputation of that people, as of Americans generally, to be swept away? swept away by a "surge of judicial opinion"? Is the sway of law among us thus to "shake like a thing unfirm"? This cannot be. At best there is no settled law in Iowa upon the subject. The court of this year has reversed the decisions of former years ; and has but taught instructions, which will return, hereafter, to plague it. Assuredly, this high tribunal of the United States, whose opinion has been expressed with clearness, will not vary its opinion and cut loose from its own, and from accepted decisions of the whole country, at a time when, above all times, change would be unwarranted in principle and freighted with disaster.

Mr. *Bissell* for the City of Dubuque : The question is, Whether a subscription to an extra-territorial railway — made by a city corporation under authority of an Act of the Legislature — is valid under the Constitution and decisions of the State of Iowa? It is not here important for us to inquire what other courts, acting under other constitutions and under other laws, may have decided. And, first, it is conceded by the other side that a city corporation has no power by virtue of its ordinary franchises to make such subscription. If the power exist at all, it is now admitted that it comes only from legislation directly authorizing it. How, then, stands the case?

I. Let it be considered irrespectively of precedents anywhere. Under our form of government, the Legislature, unlike Parliament, is not omnipotent. Irrespectively of all constitutions, bills of right, or anything of that sort, it will be conceded that the Legislature cannot directly take the property of one man and give it to another, or compel one man, or any number of men, to engage in particular pursuits, or to invest their money in particular securities. Nor can it take private property for even public purposes without just

compensation ; compensation of some kind or in some way. What it cannot do in one form it cannot do in another. What it cannot do by command, it cannot do by taxation. If the Legislature should tax the property of individuals in one city for all the expenses of another, such legislation would be void. And even in regard to improvements of a kind really public, if more than any citizen's just share of the expense of them is taken the legislation is null. If power is given to take property in one place which concerns the public at large, property not being proportionably taken from that public at large, or if property is taken from one place only for objects which concern another, the power is not one conformed to the principles of constitutional republican government. Now a man's property is as much taken by a tax as by any other form. Indeed of all modes of taking property it is the most effective, as also the most difficult to analyze and oppose. It has always been the instrument of unconstitutional legislation, and, therefore, should be watched and guarded. It is of the essence of taxation, therefore, that it be just. And wherein does this justness consist? Plainly in a just apportionment of taxes ; that is to say, an apportionment which brings to the party, in some form, just compensation for this property taken away. In regard to a man's property taken by tax and applied to purposes purely local and about him, he gets the just recompense, by the application itself. Where the application is to purposes of a wider and more public kind, — for the purposes of his State, or the United States, — he gets a just recompense, provided all others are taxed proportionably with him. But just in so far as he is taxed above them, he gets no just recompense at all. The principles are readily applied to a case like the present.

It is almost unnecessary to say, that what the Legislature cannot do directly, it cannot do indirectly. The stream can mount no higher than its source. The Legislature cannot

THE STUDY OF CASES.

create corporations with illegal powers, nor grant unconstitutional powers to those already granted.

Again : Counsel of the other side do not distinguish well between private corporations and public ones.

Private corporations are only created with the assent of the corporators. They, by becoming corporators, voluntarily enter into a contract, by which they put their money or property into a common fund, to be controlled in accordance with rules to which they have assented, and which cannot be changed without their assent. The Legislature cannot change the terms of their charter, neither can the majority of the corporators, unless it has been so prescribed in the contract, to which each corporator has given his assent. It is therefore right that these corporations should be permitted to enter into such speculations as they may choose. Each member has placed just so much of his property under the control of the corporation, as he has deemed best for his interest and no more. With public corporations it is different. The corporation is created by the Legislature without necessarily consulting the will of the inhabitants, and often, in fact, in opposition to said will. The rights, duties, and powers of public corporations may be altered or taken away at any time by legislative enactment, or greater powers may be conferred upon the corporation in the same manner. The inhabitants of such corporation have no voice in accepting the charter ; they have no power of electing how much of their property they will subject to the control of the corporation ; they cannot transfer their stock, and thus cease to be members of such corporation. The Legislature has power to create such corporation, in opposition to the will of the corporators, because such corporation is a portion of the government of the State itself, and every man yields up to the State just so many of his inherent rights, as are necessary to carry on the government which protects him. As said before every citizen of a State yields up to the State all those rights which

are necessary to carry on the government. He yields up the right without his individual assent, to be united, with other citizens, into cities, towns, counties, &c., as the Legislature may deem proper. As it is necessary to have roads, wharves, waterworks, &c., for the use of the citizens of such corporations, he yields his assent to be taxed for the creation of such works. Such works, however, when created, are under the control of the corporation. They are for the sole use of the corporation.

In regard to the State of Iowa, its Constitution comes in aid of general principles. It declares (1) that all laws of a general nature shall have a uniform operation. Is not a law which authorizes a great public improvement, — one running over the State, — a law of a general nature? Does it have a uniform operation when the cost of it is laid on the people living at one terminus, all those along its line being exempt? It declares (2) that the legislative power of the State shall be vested in the Assembly of the State; meaning, of course that it shall not be delegated. But is it not delegated when, by statute, you give a city power to legislate in a manner, which, but for the statute, it confessedly would not have? It declares (3) that the Assembly shall not “in any manner create any debt, . . . which shall singly or in the aggregate, . . . exceed \$100 000.” The restraint is not against the creation of a debt in behalf of the State, any more than on behalf of her subdivisions. The language is broad. When the State authorizes the cities, counties, townships, boroughs, which cover her whole surface, to lay debts on every respective part of her, is not the purpose of the restraint violated? A construction which renders practically vain a constitutional provision which a different interpretation, not forced, will preserve cannot be a sound one. It declares (4) that corporations shall not be created by general laws, except for political or municipal purposes. Here is a law, in fact creating a corporation for a purpose which is neither.

THE STUDY OF CASES.

It declares in the same section that the State shall **not** directly nor indirectly become a stockholder in any corporation. But does not the State become indirectly a stockholder in a corporation, when she authorizes a portion of her people to enter into an organization, which, but for her statute, they cannot have, and allows them in such form to become a stockholder in a corporation?

It is urged that the courts of the different States of the Union have decided this question so uniformly in favor of the power of the Legislature to confer the authority claimed, that it is no longer an open question. We may observe in passing that it is matter of difficulty for professional men or judges — if not belonging to a State — perfectly to understand the value of decisions made under local constitutions and local statutes in that State. They may run into great error if they read them by lights in which they are accustomed to see elsewhere. But assuming all that is claimed for them, such decisions are not binding upon this court; and if the decisions of other courts are not in accordance with the law as understood by this court, they will not be followed. If a dissenting opinion of said courts is based upon correct legal principles, this court will follow such principles, rather than an erroneous decision of a court. Let us see if the decisions of the courts of the different States do establish the principle, that a Legislature, with power like that of the State of Iowa, can confer upon municipal corporations the right to purchase stock in railroad corporations.

In the first case cited, *Goddin v. Crump*, it was decided that the Legislature of Virginia had power to authorize the city of Richmond to levy a tax, to aid in removing a bar from James River, to open navigation to the city, and to take stock in a private corporation, organized to perform such work. This river was a navigable stream, under the laws of Virginia. The court held that the levy of the tax to pay for

such stock was legal, and also held that the interest of the corporation was the true test of the corporate character of the Act, and that the Legislature was the sole judge of what would conduce to the interest of the city. The Act giving the power to aid in the construction of said work was passed at the request of a majority of the citizens of the city. The majority of the court seem to have lost sight of the fact that an interest in an improvement is entirely different from an incidental benefit arising from the same improvement. But there is a dissenting opinion by Brooke, J., which places the question upon the true grounds. He holds that such legislation violated the Bill of Rights; that the power of such corporations to tax the people must be limited to objects of purely a local character. This case arose under an express Act of the Legislature, giving the specific power claimed.

In the next case relied on, *Bridgeport v. Housatonic Railroad Co.*, it was decided that the Legislature, upon request of a city, may authorize such city to subscribe for and take stock in a railroad leading to such city, provided such act be approved by the people of the city. The only clause in the Constitution, which was claimed to restrict the Legislature, was that which forbade private property being taken for public use without compensation. This was also under an express Act of the Legislature.

In Tennessee it has been decided — the third case cited, shows — that under the provision of the Constitution of that State which provides that “the Legislature has power to grant to counties and incorporated towns the right to impose taxes for county and corporation purposes,” the Legislature may authorize a city to aid in the construction of a railroad to such corporation, and when the expenditure is by a county, the expenditure must be within the county. The Constitution of that State does not limit the grant to an expenditure municipal for municipal purposes, but for corporate purposes.

THE STUDY OF CASES.

In Kentucky it has been decided that the Legislature had power to authorize municipal corporations to take stock in railroad corporations, and levy taxes to assist in building said roads to such corporation. There is an able dissenting opinion in this case. This decision is founded upon the fact that there was no limitation to the legislative power in their Constitution, and that it was, therefore, omnipotent.

In Pennsylvania this doctrine was carried to its extreme limit in one case, — *Sharpless v. The Mayor of Philadelphia*, — where it was decided that a municipal corporation may aid in the construction of a railroad, miles away, if it can be supposed that it may benefit the corporation; and that the Legislature is the judge of the question. But in another, — *Diamond v. The County of Lawrence*, 37 *Pennsylvania State*, 358. See *Mercer County v. Hackett*, 1 *Wall*, 87, — when suit was brought on bonds, like those here, in the hands of holders who had paid value for them, the court declared that they were open to defences of every kind; and a recovery was not had.

In Illinois, where there is no constitutional limitation, it has been held that a municipal corporation may, under legislative authority, aid in the construction of railroads within the corporation.

In Florida, under a similar provision of the Constitution to that of Tennessee, it was held that a county might aid in constructing a railroad through the county. *Cotton v. Com. of Leon*, 6 *Florida*, 610.

Other States have followed the decisions we dissent from; some following them to a full extent, and some limiting the application to a narrower compass. All the decisions, we believe, are where there was no constitutional restriction, or where the power was expressly given, as in Tennessee and Florida.

In many of the decisions, the courts seem to have been imbued with the frenzy of the day, and to have lost sight

of the well-defined distinction between the powers and liabilities of municipal and private corporations.

This question, it is believed, has not been decided by this court as an independent question ; but its decisions so far are based upon the decisions of the courts of the State in which the cases originated, and upon the rule that this court will follow the decisions of State courts, as to the construction of their own Constitution or statutes. If this question has been settled by the courts in the State of Iowa, then this court will follow such ruling ; but if they have not settled it, then it is an open question for determination by this court. What is the history of these decisions ?

The Supreme Court of Iowa, in the case of *The Dubuque and Pacific Railroad Co. v. Dubuque County*, which is claimed to be decisive of this question, decided that the Constitution of the State had not deprived the citizens of the county of the right to vote the credit of said county to build a railroad within the county limits. That court uses the following language : "As the people have not, in the Constitution, delegated this power, to vote upon such propositions, nor in any way conceded or divested themselves of this right, but have in express terms affirmed in the Bill of Rights, that 'all political power is inherent in the people' (Art. 1, Sect. 2), we conclude that the people may, with constitutional propriety, vote the credit of the county to aid in the construction of a railroad within its limits ;" one judge dissenting as to the power of the county to take stock in railroads. That court has thus decided that the Constitution has not conferred upon the Legislature of the State any power to authorize such an expenditure. That this power is not in the people in their aggregate capacity, either as a town, city, county, or State, but in their individual capacity. It holds virtually that the Legislature has no such power, but that it is inherent in the people. There is noth-

THE STUDY OF CASES.

ing said about the power of the Legislature to confer this authority on a city or county.

The next case relied on is the *State v. Bissell*. In that case the question was not raised, and the court say: "This decision is not intended to sanction or deny the legal validity of the decision in the foregoing case, but to leave that question where that decision has left it." 4 G. Greene, 332.

The next case is *Clapp v. County of Cedar*. The court disposes of the constitutional question with the following remarks: "The second step would be, whether a Legislature possesses the power to confer this authority upon a county? Few have doubted the existence of this power, the question having generally been, whether the power had been exercised or whether a county possessed the desired authority without a special grant." 5 Iowa. 45. The court, however, say that "this power is not, as far as the court can see, derived from any legislative enactment," but, upon the strength of the judgment of the court in the above case of *The Dubuque and Pacific Railroad Co. v. Dubuque County*, it decides that the counties have power to aid in the construction of railroads within the limits of such county; one judge dissenting.

In *Ring v. Johnson Co.*, and *McMillen v. Boyles*, the last cases cited on the other side, the question was not directly raised nor decided, the court conceding that counties had the right to aid in the construction of railroads to be constructed within their limits; see, also, *Games v. Robb*, 8 Iowa, 199.

But confessedly the Iowa decisions in favor of these bonds end here. They were never quite unanimous, and have never given satisfaction to either profession or courts. In *Stokes v. The County of Scott*, a majority of the court assumed tenable ground, and restrained an issue about to be made. Then came *The State, ex relatione, v. The County of Wapello*, a case fully argued, much considered and unani-

mously decided. That this case does decide these bonds to be void, that such is now the law in the State of Iowa, is undeniable, we think. The court in that great case remarks, that although some fourteen or fifteen States had expressed their opinions upon this exercise of power by municipal corporations, they have not reached satisfactory conclusions. Hence, it declares, the renewed agitation on the subject; an agitation, it remarks, which "will continue to obtrude itself upon the courts of the country, year after year, until they have finally settled it upon principles of adjudication which are known to be of the class of those that are laid up among the fundamentals of the law: and which will leave the capital of private individuals where the railroad era, when it dawned upon the world, found it, namely, under the control and dominion of those who have it, to be employed in whatever field of industry and enterprise they themselves might judge best" The court then speaks of the decisions of Iowa from the first, *Dubuque Co. v. The Dubuque, &c. R. R.* in 1853, where by a divided court the power was held to have been given to the last, *Stokes v. County of Scott*, in 1859, where by a like court it was to a degree decided otherwise. "The intermediate decisions," it declares, "were an acquiescence in the former of these, by two members of the court, not upon the ground that the Legislature had in fact authorized the exercise of any such power by the cities or counties in this State (for this they had expressed very great doubts about, and affected not to believe), but because they felt themselves so much committed and trammelled by the previous decisions and subsequent legislative recognition, that they did not feel themselves at liberty, from public considerations, to unsettle the construction which the first decision had given to the code on the subject."

"In this aspect of the case," the court continues, "it will be perceived that the question now under consideration is an entirely open one in this State, and that this court as now

THE STUDY OF CASES.

constituted must pass upon it as an original question, wholly unaffected by the doctrine of *stare decisis*; or, if influenced at all by prior decisions, we should be inclined to follow the later rather than the earlier opinions." The court then examines the history of legislation in Iowa, and shows that important features in it have escaped the notice of judges who first gave a construction to the code. It then inquires whether the Legislature can pass laws like those in question, and considers the question on the principles of State and of municipal governments, and on the character and responsibilities, the risks and liabilities, of railroad corporations; declaring that the Legislature cannot. The court was conscious of the importance of the decision they were making. They say, in denying the validity of these bonds: "We are not insensible that in doing so, at this late day, we are liable to expose ourselves and our people to the charge of insincerity and bad faith, and perhaps that which is still worse, inflict a great wrong upon innocent creditors and bondholders: consequences which we would most gladly have avoided, if we could have done so and been true to the obligations of conscience and principle." But they declare that the legislative power assumed "practically overturns one of the reserved and fundamental rights of the citizen, that of making his own contracts, choosing his own business pursuits, and managing his property and means in his own way, and which, under the Constitution of this State, however it may be elsewhere, entitles him to the intervention and protection of the courts, we are willing to risk the consequences resulting from the exercise of such a power as furnishing a sufficient answer in itself to all the reasons which have been or may be assigned in favor of its exercise." In answer to the cry about improvement and trade, they declare that if any person "who believes the law to possess the dignity of a science, and hold an exalted rank in the empire of reason," will "analyze the question with reference to the principles and theory of our

own political organization, he will discover that it implicates a right which in importance is above all or any interest connected with the business relation or the physical improvements of the county." And rendering everything to its proper sphere, and leaving to the law its duties, and to conscience hers, they end with this declaration: "We know, however, that there is such a thing as a moral sense and a public faith which may be successfully appealed to, when the law is impotent to afford relief. These sentiments, we cannot but believe still reside in the hearts and consciences of our people, and may be invoked to save themselves and their State from seeming bad faith." The case may be avoided or evaded. Answered, on principle, it cannot be.

Amey v. Alleghany City, decided in this court in 1859, 24 Howard, 364, is one of the decisions relied on to support the plaintiff's case; but that decision is against it. The case, a Pennsylvania one, acknowledged the force of the argument we have used as to the proper objects of legislation, and the constitutionality or unconstitutionality of statutes accordingly. But the court considered that constitutionality was not there open for discussion; it having been affirmed by the State court. If it had been open such legislation would not have been supported. "We have not," say the court, "discussed that position of the learned counsel. Agreeing with him in the main, as to the foundations upon which the correctness of legislation should be tested, and the objects for which it ought to be approved, we cannot, with the respect which we have for the judiciary of his State, discuss the imputed unconstitutionality of the Acts; it having been repeatedly decided by the judges of the courts of Pennsylvania, including its Supreme Court, that Acts for the same purposes as those are which we have been considering were constitutional."

If this court considers, as the court of Iowa has done, that the constitutionality of the Iowa Acts is open for considera-

THE STUDY OF CASES.

tion, they will decide that constitutionality does not exist, and that the bonds are void.

Then, the question is, whether the Constitution and laws of a State are to be construed by the State courts of other States, or by its own courts? whether, in a case where no power to interpret above the State's court is given to the Supreme Court of the United States — as such power is given in certain other cases, Judiciary Act, 1789, § 25, where a writ of error lies to the highest State court from this — this court will determine that the Constitution and statutes of a State mean one thing, when the courts of the State itself have solemnly adjudged that they mean another? whether this court will say, that the State courts have decided a question, when the judges who sit on the bench of that court are declaring unanimously that “the question is an entirely open one,” and to be passed upon as an “original question”? whether, because dealers upon change, whose daily bread, like that of underwriters, is “risk ;” people upon the “Rhine” — the respectable citizens of the Juden-Gasse of Frankfurt-am-Maine — have bought these bonds at large discounts, on account of those doubts of their legality which everywhere have attended the issue of them, shall have them enforced in the face of the constitutions and solemn decisions of the State courts, simply because they have bought and yet hold them? These are the questions ; some of them grave ones, — if resolved in the affirmative.

Mr. Justice SWAYNE delivered the opinion of the court : —

The whole case resolves itself into a question of the power of the city to issue bonds for the purpose stated.

The Act incorporating the city, approved February 24, 1847, provides as follows : —

“SECT. 27. That whenever, in the opinion of the City Council, it is expedient to borrow money for any public purpose, the question shall be submitted to the citizens of

Dubuque, the nature and object of the loan shall be stated, and a day fixed for the electors of said city to express their wishes, the like notice shall be given as in cases of election, and the loan shall not be made unless two-thirds of all the votes polled at such election shall be given in the affirmative."

"By an Act approved January 8th, 1851, the Act of incorporation was 'so amended as to empower the City Council to levy annually a special tax to pay interest on such loans as are authorized by the 27th section of said Act.'"

An Act approved January 28th, 1857, contains these provisions: —

"That the city of Dubuque is hereby authorized and empowered to aid in the construction of the Dubuque Western and the Dubuque, St. Peter's & St. Paul Railroad Companies, by issuing \$250,000 of city bonds to each, in pursuance of a vote of the citizens of said city, taken in the month of December, A. D. 1856. Said bonds shall be legal and valid, and the City Council is authorized and required to levy a special tax to meet the principal and interest of said bonds, in case it shall become necessary from the failure of funds from other sources."

"The proclamation, the vote, and bonds issued or to be issued, are hereby declared valid, and the said railroad companies are hereby authorized to expend the money arising from the sale of said bonds, without the limits of the city and county of Dubuque, in the construction of either of said roads, and neither the city of Dubuque, nor any of the citizens, shall ever be allowed to plead that said bonds are invalid."

By these enactments, if they are valid, ample authority was given to the city to issue the bonds in question. The city acted upon this authority. The qualifications coupled with

THE STUDY OF CASES.

the grant of power contained in the 27th section of the Act of incorporation are not now in question. If they were, the result would be the same. When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper. *Commissioners of Knox Co. v. Aspinwall*, 21 Howard, 539; *Royal British Bank v. Turquand*, 6 Ellis & Blackburn, 327; *Farmers, Land & T. v. Curtis*, 3 Selden, 466; *Stoney v. A. L. I. Co.*, 11 Paige, 635; *Morris Canal & B. Co. v. Fisher*, 1 Stockton's Chancery, 667; *Willmarth v. Crawford*, 10 Wendell, 343; *Alleghany City v. McClurkan*, 14 Pennsylvania State, 83. If there were any irregularity in taking the votes of the electors or otherwise in issuing the bonds, it is remedied by the curative provisions of the Act of January 28, 1857.

Where there is no defect of constitutional power, such legislation, in cases like this, is valid. This question, with reference to a statute containing similar provisions, came under the consideration of the Supreme Court of Iowa, in *McMillen v. Boyles*, 6 Iowa, 305, and again in *McMillen et al. v. The County Judge and Treasurer of Lee County, Id.* 391. The validity of the Act was sustained. Without these rulings we should entertain no doubt upon the subject. *Wilkinson v. Leland*, 2 Peters, 627; *Satterlee v. Matthewson*, 2 Id. 380; *Baltimore & S. R. Co. v. Nesbit et al.*, 10 Howard, 395; *Whitewater Valley Canal Co. v. Vallette*, 21 Id. 425.

It is claimed "that the Legislature of Iowa had no authority under the Constitution to authorize municipal corporations to purchase stock in railroad companies, or to issue bonds in payment of such stock." In this connection our attention has been called to the following provisions of the Constitution of the State : —

"ART. 1. § 6. All laws of a general nature shall have a uniform operation."

"ART. 3, § 1. The legislative authority of the State shall be vested in a Senate and a House of Representatives, which shall be designated as the General Assembly of the State of Iowa," &c.

"ART. 7. The General Assembly shall not in any manner create any debt or debts, liability or liabilities which shall, singly or in the aggregate, exceed the sum of one hundred thousand dollars, except," &c. The exceptions stated do not relate to this case.

"ART 8, §2. Corporations shall not be created in this State by special laws, except for political or municipal purposes, but the General Assembly shall provide by general laws for the organization of all other corporations, except corporations with banking privileges, the creation of which is prohibited. The stockholders shall be subject to such liabilities and restrictions as shall be provided by law. The State shall not, directly or indirectly, become a stockholder in any corporation."

Under these provisions it is insisted, —

1. That the general grant of power to the Legislature did not warrant it in conferring upon municipal corporations the power which was exercised by the city of Dubuque in this case.

2. That the seventh article of the Constitution prohibits the conferring of such power under the circumstances stated in the answer, — debts of counties and cities being, within the meaning of the Constitution, debts of the State.

3. That the eighth article forbids the conferring of such power upon municipal corporations by special laws.

All these objections have been fully considered and repeatedly overruled by the Supreme Court of Iowa. *Dubuque Co. v. The Dubuque & Pacific R. R. Co.*, 4 Greene, 1; *The*

THE STUDY OF CASES.

State *v.* Bissel, 4 Id. 328; Clapp *v.* Cedar Co., 5 Iowa, 15; Ring *v.* County of Johnson, 6 Id. 265; McMillen *v.* Boyles, 6 Id. 304; McMillen *v.* The County Judge of Lee Co., 6 Id. 393; Games *v.* Robb, 8 Id. 193; State *v.* The Board of Equalization of the County of Johnson, 10 Id. 157. The earliest of these cases was decided in 1853, the latest in 1859. The bonds were issued and put upon the market between the periods named. These adjudications cover the entire ground of this controversy. They exhaust the argument upon the subject. We could add nothing to what they contain. We shall be governed by them, unless there be something which takes the case out of the established rule of this court upon that subject.

It is urged that all these decisions have been overruled by the Supreme Court of the State, in the later case of the State of Iowa, *ex relatione*, *v.* The County of Wapello, 13 Iowa, 390, and it is insisted that in cases involving the construction of a State law or Constitution, this court is bound to follow the latest adjudication of the highest court of the State. Leffingwell *v.* Warren, 2 Black, 599, is relied upon as authority for the proposition. In that case this court said it would follow "the latest settled adjudications." Whether the judgment in question can, under the circumstances, be deemed to come within that category, it is not now necessary to determine. It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen States of the Union. Many of the cases in the other States are marked by the profoundest legal ability.

The late case in Iowa, and two other cases of a kindred character in another State, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety. However we may regard the late case

in Iowa as affecting the future, it can have no effect upon the past. "The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law." *The Ohio Life & Trust Co. v. Debolt*, 16 Howard, 432.

The same principle applies where there is a change of judicial decision as to the constitutional power of the Legislature to enact the law. To this rule thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case.

Bonds and coupons, like these, by universal commercial usage and consent, have all the qualities of commercial paper. If the plaintiffs recover in this case, they will be entitled to the amount specified in the coupons, with interest and exchange as claimed. *White v. The V. & M. R. R. Co.*, 21 Howard, 575; *Commissioners of the County of Knox v. Aspinwall et al.*, 21 Id. 539.

We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own States. It is the settled rule of this court in such cases, to follow the decisions of the State courts. But there have been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice and the law, because a State tribunal has erected the altar and decreed the sacrifice.

The judgment below is reversed, and the cause remanded for further proceedings in conformity to this opinion.

Judgment and mandate accordingly.

THE STUDY OF CASES.

Mr. Justice MILLER dissenting: —

In the opinions which have just been delivered, I have not been able to concur. But I should have contented myself with the mere expression of dissent, if it were not that the principle on which the court rests its decision is one not only essentially wrong, in my judgment, but one which, if steadily adhered to in future, may lead to consequences of the most serious character. In adopting that principle, this court has, as I shall attempt to show, gone in the present case a step in advance of anything heretofore ruled by it on the subject, and has taken a position which must bring it into direct and unseemly conflict with the judiciary of the States. Under these circumstances, I do not feel at liberty to decline placing upon the records of the court the reasons which have forced me, however reluctantly, to a conclusion different from that of the other members of the court.

The action in the present case is on bonds of the city of Dubuque, given in payment of certain shares of the capital stock of a railroad company, whose road runs from said city westward. The court below held, that the bonds were void for want of authority in the city to subscribe and pay for such stock. It is admitted that the Legislature had, as to one set of bonds, passed an act intended to confer such authority on the city, and it is claimed that it had done so as to all the bonds. I do not propose to discuss this latter question.

It is said, in support of the judgment of the court below, that all such grants of power by the Legislature of Iowa to any municipal corporation is in conflict with the Constitution of the State and, therefore, void. In support of this view of the subject, the cases of *Stokes v. Scott County*, 10 Iowa, 166, and *State v. County of Wapello*, 13 Iowa, 398, are relied on.

In the last mentioned case, the County of Wapello had agreed to take stock in a company whose road passed

through the county, but had afterwards refused to issue the bonds which had been voted by the majority of the legal voters. The relator prayed a writ of *mandamus* to compel the officers of the county to issue the bonds. One question raised in the discussion was, whether section 114 of the Code of Iowa, of 1851, was intended to authorize the counties of the State to take stock in railroad companies? And another was, that conceding such to be the fair construction of that section of the code, was it constitutional?

The Supreme Court, in a very elaborate and well-reasoned opinion, held that there was no constitutional power in the legislature to confer such authority on the counties, or on any municipal corporation. This decision was made in a case where the question fairly arose, and where it was necessary and proper that the court should decide it. It was decided by a full bench and with unanimity. It was decided by the court of highest resort in that State, to which is confided, according to all the authorities, the right to construe the Constitution of the State, and whose decision is binding on all other courts which may have occasion to consider the same question, until it is reversed or modified by the same court. It has been followed in that court by several other decisions to the same point, not yet reported. It is the law administered by all the inferior judicial tribunals in the State, who are bound by it beyond all question. I apprehend that none of my brethren who concur in the opinion just delivered, would go so far as to say that the inferior State courts would have a right to disregard the decision of their own appellate court, and give judgment that the bonds were valid. Such a course would be as useless as it would be destructive of all judicial subordination.

Yet this is in substance what the majority of the court have decided.

They have said to the Federal court sitting in Iowa: "You shall disregard this decision of the highest court of the State

on this question. Although you are sitting in the State of Iowa, and administering her laws, and construing her Constitution, you shall not follow the latest, though it be the soundest, exposition of its Constitution by the Supreme Court of that State, but you shall decide directly to the contrary; and where that court has said that a statute is unconstitutional, you shall say that it is constitutional. When it says bonds are void, issued in that State, because they violate its Constitution, you shall say they are valid, because they do not violate the Constitution."

Thus we are to have two courts, sitting within the same jurisdiction, deciding upon the same rights, arising out of the same statute, yet always arriving at opposite results, with no common arbiter of their differences. There is no hope of avoiding this, if this court adheres to its ruling. For there is in this court no power, in this class of cases, to issue its writ of error to the State court, and thus compel a uniformity of construction, because it is not pretended that either the statute of Iowa, or its Constitution, or the decision of its courts thereon, are in conflict with the Constitution of the United States, or any law or treaty made under it.

Is it supposed for a moment that this treatment of its decision, accompanied by language as unsuited to the dispassionate dignity of this court, as it is disrespectful to another court of at least concurrent jurisdiction over the matter in question, will induce the Supreme Court of Iowa to conform its rulings to suit our dictation in a matter which the very frame and organization of our government places entirely under its control? On the contrary, such a course, pursued by this court, is well calculated to make that court not only adhere to its own opinion with more tenacity, but also to examine if the law does not afford them the means, in all cases, of enforcing their own construction of their own Constitution and their own statutes, within the limits of their own jurisdiction. What this may lead to it is not possible

now to foresee, nor do I wish to point out the field of judicial conflicts, which may never occur, but which, if they shall occur, will weigh heavily on that court which should have yielded to the other, but did not.

The general principle is not controverted by the majority, that to the highest courts of the State belongs the right to construe its statutes and its Constitution, except where they may conflict with the Constitution of the United States, or some statute or treaty made under it. Nor is it denied that when such a construction has been given by the State court, that this court is bound to follow it. The cases on this subject are numerous, and the principle is as well settled, and is as necessary to the harmonious working of our complex system of government, as the correlative proposition that to this court belongs the right to expound conclusively, for all other courts, the Constitution and laws of the Federal government.

Shelby v. Guy, 11 Wheat. 361; *McCluny v. Silliman*, 3 Pet. 278; *Van Rensselaer v. Kearney*, 11 How. 296; *Webster v. Cooper*, 14 How. 504; *Elmendorf v. Taylor*, 10 Wheat. 152; *Bank v. Dudley*, 2 Pet. 492.

But while admitting the general principle thus laid down, the court says it is inapplicable to the present case, because there have been conflicting decisions on this very point by the Supreme Court of Iowa, and that as the bonds issued while the decisions of that court holding such instruments to be unconstitutional were unreversed, that this construction of the constitution must now govern this court instead of the later one. The moral force of this proposition is, unquestionably, very great. And I think, taken in connection with some fancied duty of this court to enforce contracts, over and beyond that appertaining to other courts, has given the majority a leaning towards the adoption of a rule, which in my opinion cannot be sustained either on principle or authority.

THE STUDY OF CASES.

The only special charge which this court has over contracts, beyond any other court, is to declare judicially whether the statute of a State impairs their obligation. No such question arises here, for the plaintiff claims under and by virtue of the statute which is here the subject of discussion. Neither is there any question of the obligation of contracts, or the right to enforce them. The question goes behind that. We are called upon, not to construe a contract, nor to determine how one shall be enforced, but to decide whether there ever was a contract made in the case. To assume that there was a contract, which contract is about to be violated by the decisions of the State court of Iowa, is to beg the very question in dispute. In deciding this question the court is called upon, as the court in Iowa was, to construe the Constitution of the State. It is a grave error to suppose that this court must, or should, determine this upon any principle which would not be equally binding on the courts of Iowa, or that the decision should depend upon the fact that certain parties had purchased bonds which were supposed to be valid contracts, when they really were not.

The Supreme Court of Iowa is not the first or the only court which has changed its rulings on questions as important as the one now presented. I understand the doctrine to be, in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and, in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859. For it is impliedly conceded, that if these bonds had been issued since the more recent decision of the Iowa court, this court would not hold them valid.

Not only is the decision of the court, as I think, thus

unsound in principle, but it appears to me to be in conflict with its former decisions on this point, as I shall now attempt to show.

In the case of *Shelby v. Guy*, 11 Wheat. 361, a question arose on the construction of the Statute of Limitations of Tennessee. It was an old English statute, adopted by Tennessee from North Carolina, and which had in many other States received a uniform construction. It was stated on the argument, however, that the highest court of Tennessee had given a different construction to it, although the opinion could not then be produced. The court said, that out of a desire to follow the courts of the State in the construction of their own statute, it would not then decide that question, but as the case had to be reversed on other points, it would send it back, leaving that question undecided.

In the case of the *United States v. Morrison*, 4 Pet. 124, the question was, whether a judgment in the State of Virginia was, under the circumstances of that case, a lien on the real estate of the judgment debtor. In the Circuit Court this had been ruled in the negative, I presume, by Chief Justice Marshall, and a writ of error was prosecuted to this court. Between the time of the decision in the Circuit Court and the hearing in this court, the court of appeals in Virginia had decided, in a case precisely similar, that the judgment was a lien. This court, by Chief Justice Marshall, said it would follow the recent decision of the court of appeals without examination, although it required the reversal of a judgment in the Circuit Court rendered before that decision was made.

The case of *Green v. Neal*, 6 Pet. 291, is almost parallel with the one now under consideration, but stronger in the circumstances under which the court followed the later decision of the State courts in the construction of their own statute. It is stronger in this, that the court there overruled two former decisions of its own, based upon former decisions

THE STUDY OF CASES.

of the State court of Tennessee, in order to follow a later decision of the State court after the law had been supposed to be settled for many years. The case was one on the construction of the Statute of Limitations, and the Circuit Court at the trial had instructed the jury, "that according to the present state of decisions in the Supreme Court of the United States, they could not charge that defendant's title was made good by the Statute of Limitations." The decisions here referred to were the cases of *Patton v. Easton*, 1 Wheat. 476, and *Powell v. Harman*, 2 Pet. 241.

The first of these cases was argued in the February Term, 1815, by some of the ablest counsel of the day, and the opinion delivered more than a year afterwards. In that opinion Chief Justice Marshall recites the long dispute about the point in North Carolina and Tennessee, and says it has at length been settled by the Supreme Court of the latter State by two recent decisions, made after the case then before it had been certified to this court, and the court follows those decisions. This is reaffirmed in the second of the above mentioned cases.

In delivering the opinion in the case of *Green v. Neal*, Justice McLean says that the two decisions in Tennessee referred to by Judge Marshall were made under such circumstances that they were never considered as fully settling the point in that State, there being contrariety of opinion among the judges. The question, he says, was frequently raised before the Supreme Court of Tennessee, but was never considered as finally settled, until 1825, the first decision having been made in 1815. The opinion of Judge McLean is long, and the case is presented with his usual ability, and I will not here go into further details of it. It is sufficient to say that the court holds it to be its duty to abandon the first two cases decided in Tennessee, to overrule their own well-considered construction in the case of *Patton v. Easton*, and its repetition in *Powell v. Green*, and to follow without exam-

ination the later decision of the Supreme Court of Tennessee, which is in conflict with them all.

At the last term of this court, in the case of *Leffingwell v. Warren* (67 U. S. 261), my very learned associate, who has just delivered the opinion in this case, has collated the authorities on this subject, and thus on behalf of the whole court announces the result:—

“The construction given to the State statute by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. . . . If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decision, this court will follow the latest settled adjudications.” *United States v. Morrison*, 4 Pet. 124; *Green v. Neal*, 6 Pet. 291.

It is attempted, however, to distinguish the case now before us from those just considered, by saying that the latter relate to what is rather ambiguously called a rule of property, while the former concerns a matter of contract. I must confess my inability to see any principle on which the distinction can rest. All the statutes of the States which prescribe the formalities and incidents to conveyances of real estate would, I presume, be held to be rules of property. If the deed by which a man supposes he has secured to himself and family a homestead, fails to comply in any essential particular with the statute or Constitution of the State, as expounded by the most recent decision of the State court, it is held void by this court without hesitation, because it is a rule of property, and the last decision of the State court must govern, even to overturning the well-considered construction of this court. But if a gambling stockbroker of Wall Street buys at twenty-five per cent. of their par value, the bonds issued to a railroad company in Iowa, although the court of the State, in several of its most recent decisions, have decided that such bonds were issued in violation of the Constitution, this court

THE STUDY OF CASES.

will not follow that decision, but resort to some former one, delivered by a divided court, because in the latter case it is not a rule of property, but a case of contract. I cannot rid myself of the conviction that the deed which conveys to a man his homestead, or other real estate, is as much a contract as the paper issued by a municipal corporation to a railroad for its worthless stock, and that a bond when good and valid is property. If bonds are not property, then half the wealth of the nation, now so liberally invested in the bonds of the government, both State and national, and in bonds of corporations, must be considered as having no claim to be called property. And when the construction of a Constitution is brought to bear upon the questions of property or no property, contract or no contract, I can see no sound reason for any difference in the rule for determining the question.

The case of *Rowan v. Runnels*, 5 How. 134, is relied on as furnishing a rule for this case, and support to the opinion of the court. In that case the question was on the validity of a note given for the purchase of slaves, imported into the State of Mississippi. It was claimed that the importation was a violation of the constitution of the State, and the note, therefore, void. In the case of *Groves v. Slaughter*, 5 Pet. 449, this court had previously decided that very point the other way. In making that decision it had no light from the courts of Mississippi, but was called on to make a decision in a case of the first impression. The court made a decision, with which it remained satisfied when *Rowan v. Runnels* came before it, and which is averred by the court to have been in conformity to the expressed sense of the Legislature, and the general understanding of the people of that State. The court, therefore, in *Rowan v. Runnels*, declined to change its own rulings, under such circumstances, to follow a single later and adverse decision of the Mississippi court.

In the case now before the court it is not called on to

retract any decision it has ever made, or any opinion it has declared: The question is before this court for the first time, and it lacks in that particular the main ground on which the judgment of this court rested in *Rowan v. Runnels*. It is true that the Chief Justice in delivering the opinion in that case, goes on to say, in speaking of the decision of the State courts on their own Constitution and laws: "But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this court, were lawfully made." I have to remark, in the first place, that this *dictum* was unnecessary, as the first and main ground was, that this court could not be required to overrule its own decision, when it had first occupied the ground, and when it still remained of the opinion then declared. Second, that the contract in *Rowan v. Runnels* was between a citizen of Mississippi, on the one part, and a citizen of Virginia on the other, and the language of the Chief Justice makes that the ground of the right of this court to disregard the later decision of the State court; and in this case the contract was made between the City of Dubuque and a railroad company, both of which were corporations existing under the laws of Iowa, and citizens of that State, in the sense in which that word is used by the chief justice. And, thirdly, the qualification is used in the *Runnels* case that the "contracts were, in the judgment of this court, lawfully made." In the present case, the court rests on the former decision of the State court, declining to examine the constitutional question for itself.

The distinction between the cases is so obvious as to need no further illustration.

The remaining cases in which the subject is spoken of, may be mentioned as a series of cases brought into the Supreme Court of the United States by writ of error to the Supreme Court of Ohio, under the twenty-fifth section of the

THE STUDY OF CASES.

Judiciary Act. In all these cases the jurisdiction of the Supreme Court of the United States was based upon the allegation that a statute of Ohio, imposing taxes upon bank corporations, was a violation of a previous contract made by the State with them, in regard to the extent to which they should be liable to be taxed. In the argument of these cases it was urged that the very judgments of the Supreme Court of Ohio, which were then under review, being the construction placed by the courts of that State on their own statutes and Constitution, should be held to govern the Supreme Court of the Union, in the exercise of its acknowledged right of revising the decision of the State court in that class of cases. It requires but a bare statement of the proposition to show that, if admitted, the jurisdiction of the Federal Supreme Court to sit as a revisory tribunal over the State courts, in cases where the State law is supposed to impair the obligation of a contract, would be the merest sham.

It is true that in the extract, given in the opinion of the court just read, from the case of *The Ohio Trust Co. v. Debolt*, language is used by Chief Justice Taney, susceptible of a wider application. But he clearly shows that there was in his mind nothing beyond the case of a writ of error to the Supreme Court of a State, for he says, in the midst of the sentence cited, or in the immediate context: "The writ of error to a State court would be no protection to a contract, if we were bound to follow the judgment which the State court had given, and which the court brings up here for revision." Besides, in the opinion thus cited, the Chief Justice says, in the commencement of it, that he only speaks for himself and Justice Grier. The remarks cited, then, were not the opinion of the court, were outside the record, and were evidently intended to be confined to the case of a writ of error to the court of a State, where it was insisted that the judgment sought to be revised should conclude this court.

But let us examine for a moment the earlier decisions in

the State court of Iowa, on which this court rests with such entire satisfaction.

The question of the right of municipal corporations to take stock in railroad companies, came before the Supreme Court of Iowa, for the first time, at the June Term, A.D. 1853, in the case of Dubuque County v. Dubuque & P. R. R. Co., 4 Greene (Iowa), 17. The majority of the court, Kinney, J., dissenting, affirmed the judgment of the court below, and in so doing must necessarily have held that municipal corporations could take stock in railroad enterprises. The opinions of the court were, by law, filed with the clerk, and by him copied into a book kept for that purpose. The dissenting opinion of Judge Kinney, a very able one, is there found in its proper place, in which he says he has never seen the opinion of the majority. No such opinion is to be found in the clerk's office, as I have verified by a personal examination; nor was it ever seen, until it was published five years afterwards, in the volume above referred to, by one of the judges, who had ceased to be either judge or official reporter at the time it was published. Shortly after this judgment was rendered, Judge Kinney resigned, and his place was supplied by Judge Hall. The case of *The State v. Bissell, 4 Greene (Iowa), 328*, then came before the court in 1854. In this case, after disposing of several questions relating to the regularity of the proceedings in issuing bonds for a railroad subscription, Judge Hall, who delivered the opinion of the court, then refers to the right of the county to take stock and issue bonds for railroad purposes. He says: "This point is not urged, and the same question having been decided at the December Term of this court in 1853, in the case of *Dubuque & Pacific R. R. Co. v. Dubuque County*, is not examined. This decision is not intended to sanction or deny the legal validity of that decision, but to leave the question where that decision left it." It is clear that if Judge Hall had concurred with the other two judges, no such

THE STUDY OF CASES.

language as this would have been used, but they would have settled the question by a unanimous opinion. In the case of *Clapp v. Cedar County*, 5 Iowa, 15, the question came up again in the same court, composed of new judges. The Chief Justice, Wright, was against the power of the counties to subscribe stock, and delivered an able dissenting opinion to that purport. The other two judges, however, while in substance admitting that no such power had been conferred by law, held that they must follow the decision in the *Dubuque* case. Several other cases followed these, with about the same result, up to 1859, Wright always protesting, and the other judges overruling him. In 1859, in the case of *Stokes v. Scott County*, 10 Iowa, 166, which was an application to restrain the issue of bonds voted by the county, Judge Stockton said that, in a case like that, where the bonds had not passed into the hands of *bona fide* holders, he felt at liberty to declare them void, and concurring with Judge Wright that far, they so decided; Judge Wright placing his opinion upon a want of constitutional power in the Legislature. Finally, in the case of *The State v. Wapello County*, 13 Iowa, 398, the court now composed of Wright, Lowe, and Baldwin, held, unanimously, that the bonds were void absolutely, because their issue was in violation of the constitution of the State of Iowa. The opinion in that case, delivered by Judge Lowe, covers the whole ground, and after an examination of all the previous cases, overrules them all, except *Stokes v. Scott County*. It is exhausting, able, and conclusive, and after a struggle of seven or eight years, in which this question has been always before the court, and never considered as closed, this case may now be considered as finally settling the law on that subject in the courts of Iowa. It has already been repeated in several cases not yet reported. It is the first time the question has been decided by a unanimous court. It is altogether improbable that any serious effort will ever be made to shake

its force in that State ; for of the nine judges who have occupied the bench while the matter was in contest, but two have ever expressed their approbation of the doctrine of the Dubuque County case.

Comparing the course of decisions of the State courts in the present case with those upon which this court acted in *Green v. Neal*, 6 Pet. 291, how do they stand?

In the latter case the court of Tennessee had decided by a divided court in 1815, and that decision was repeated several times, but with contrariety of opinion among the judges, up to 1825, when the former decisions were reversed. In the cases which we have been considering from Iowa, the point was decided in 1853 by a divided court ; it was repeated several times up to 1859, by a divided court, under a continuous struggle. In 1859 the majority changed to the other side, and in 1862 it became unanimous. In the Tennessee case, this court had twice committed itself to the decision first made by the courts of that State ; yet it retracted and followed the later decision made ten years after. In the present case, this court, which was not committed at all, follows decisions which were never unanimous, which were struggled against and denied, and which had only six years of judicial life, in preference to the later decisions commenced four years ago, and finally receiving the full assent of the entire court.

I think I have sustained, by this examination of the cases, the assertion made in the commencement of this opinion, that the court has, in this case, taken a step in advance of anything theretofore decided by it on this subject. That advance is in the direction of a usurpation of the right, which belongs to the State courts, to decide as a finality upon the construction of State Constitutions and State statutes. This invasion is made in a case where there is no pretence that the Constitution, as thus construed, is any infraction of the laws or Constitution of the United States.

THE STUDY OF CASES.

The importance of the principle thus for the first time asserted by this court, opposed, as it is, to my profoundest convictions of the relative rights, duties, and comities, of this court, and the State courts, will, I am persuaded, be received as a sufficient apology for placing on its record, as I now do, my protest against it.¹

Case 17. — Farrior v. New England Mortgage Security Co.

FARRIOR *v.* NEW ENGLAND MORTGAGE SECURITY COMPANY.

SUPREME COURT OF ALABAMA, NOVEMBER TERM, 1890.

[92 Ala. 176.]

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. John A. Foster.

In May, 1883, James S. Farrior and Minnie E. Farrior, his wife, borrowed some money from the appellant loan company; and to secure the payment thereof, executed their joint notes and joint mortgage on certain lands, among which were included lands belonging to the separate estate of the said Minnie E. Farrior. This indebtedness, as evidenced by the note and secured by the mortgage, was not paid; and the loan company filed its bill of complaint, asking for a foreclosure of said mortgage. This bill was several times successfully demurred to, and was finally so amended as to aver and set out as an exhibit the deed by which the said Minnie E. Farrior held and claimed title to the part of the said lands averred to belong to her, and alleged that the said deed created in her an equitable and not a statutory separate estate under the laws of this State. This bill as last amended was demurred to principally on the ground that it

¹ See §§ 18, 42, 47-48, 53-54, 58, 61, 73-79, 85-97, 104, 107, 121, 125-127, 129-130.

Cf. *Burgess v. Seligman*, 107 U. S. 20, 33-35 (1882).

showed that it was an attempt to foreclose a mortgage given on the statutory separate estate of a married woman. A cross-bill was also filed by Minnie E. Farrior, alleging that the said mortgage was a cloud upon her title; and prayed that the same be cancelled as to the lands claimed by her. This cross-bill was demurred to by the complainant. The demurrer to the original bill was overruled, and the demurrer to the cross-bill was sustained. The recitals of the deed from James S. Farrior to his wife, Minnie E. Farrior, are sufficiently set forth in the opinion of this court. This appeal is prosecuted by the defendants in the court below, from the decree of the chancellor overruling the demurrers to the original bill as last amended, and sustaining the demurrer to the cross-bill; and the said decrees are assigned as error here. The only question presented by several assignments of error, based on the rulings of the chancellor upon the demurrers, is as to the validity of the mortgage given by Farrior and his wife to the complainant, and this depends upon whether the deed from James S. Farrior to his wife, Minnie E. Farrior, created in her a statutory or equitable separate estate.

Watts & Son, for appellants, contended that the deed created in the wife a statutory separate estate, which rendered the mortgage void as to her property, and cited *Loeb v. McCullough*, 78 Ala. 533; *Parker v. Marks*, 82 Ala. 548; *Jordan v. Smith*, 83 Ala. 302.

Webb & Tillman, contra. At the time, and prior to the making of the mortgage the Supreme Court had declared that a deed, like the one involved in this suit, created in the wife an equitable separate estate. *Goodlett v. Hansell*, 66 Ala. 151; *Masson v. Kelly*, 70 Ala. 85. These decisions being of force at the time of the execution of the mortgage sought to be foreclosed, no subsequent judicial decisions, overruling the former construction of the statute in reference to married women, can affect the rights of the contracting

THE STUDY OF CASES.

parties. *Gelpcke v. City of Dubuque*, 1 Wall. (U. S.) 208 ; *Alcott v. Supervisors*, 16 Wall. 678 ; *Douglass v. County of Pike*, 101 U. S. 686 ; *Taylor v. Ypsilanti*, 105 U. S. 72 ; *County of Rawls v. Douglass*, 105 U. S. 732.

COLEMAN, J. Many of the questions raised by the pleadings in this case have been considered and adjudicated in recent decisions in this court. *New Eng. Mort. Sec. Co. v. Ingram*, 91 Ala. 337, 9 So. Rep. 140 ; *Nelms v. Edinburgh Amer. Land Mort. Co.*, 92 Ala. 157, 9 So. Rep. 141 ; *Amer. Freehold Land Mort. Co. v. Sewell*, 92 Ala. 163, 9 So. Rep. 143.

The one question of supreme importance presented for review in this record did not arise in either of the foregoing cases cited.

On or about May 1, 1883, in order to procure a loan from the New England Mortgage Security Co., J. S. Farrior and his wife, Minnie E. Farrior, executed a promissory note to the company, and secured the same by mortgage on certain lands in Lowndes county, Alabama. By deed of conveyance executed by J. S. Farrior to his wife, on the 3d of October, 1882, a part of these lands were conveyed to her to pay and satisfy an indebtedness of the husband to the wife. The consideration of this deed from Farrior to his wife is stated to be for "two thousand and seven dollars, the amount of money and property used and converted of the *corpus* of the separate estate of the wife." At the time of the execution of the note and mortgage to secure the loan, the wife had no legal capacity to bind her statutory estate by mortgage or other contract, but she could bind her equitable separate estate as if she were a *feme sole*.

By repeated decisions of this court, in reference to the married woman's law creating in the wife a statutory separate estate, it was held that a conveyance of lands from the husband to the wife vested in the wife an equitable separate estate, and this was the effect of such conveyance, notwith-

standing the consideration was property, the *corpus* of her statutory estate, or indebtedness of the husband on account of money, the *corpus* of her statutory estate, used and converted by him.

These decisions of the Supreme Court of this State, thus construing the statute, and declaring the character of the estate conveyed to the wife, and her capacity to incur it by contract, were in force at the time the note and mortgage involved in the present case were executed. *Turner v. Kelly*, 70 Ala. 85; *Goodlett v. Hansell*, 66 Ala. 161; *McMillan v. Peacock*, 57 Ala. 129.

Subsequent to this time, but before the filing of complainant's bill, the Supreme Court of the State overruled these authorities, and held that "by no contract between the husband and wife, can her statutory separate estate be converted into an equitable estate, with power in the wife to charge it;" and expressly and "intentionally" overruled the former decisions which hold to the contrary. *Loeb v. McCullough*, 78 Ala. 533; *Jordan v. Smith*, 83 Ala. 302; *Parker v. Marks*, 82 Ala. 548. The reasons *pro* and *con*, upon which the different decisions rest, need not be here reconsidered. The court adheres to the later decisions, and reaffirms the rule of law declared in *Loeb v. McCullough*, *supra*.

The question presented for consideration is the effect of the later decisions upon contracts and rights of property acquired under the statute as construed by the former decisions, and while those decisions were in force.

It has been repeatedly declared by the highest tribunals in this country, and many eminent jurists, that a fixed and received construction of a statute, made by the Supreme Court of the State, makes a part of such statute law. *Green v. Neal*, 6 Pet. 297; *Shelby v. Guy*, 11 Wheat. 368.

In the case of the *Ohio Life Insurance Co. v. Debolt*, 16 How. (U. S.), 432, *TANEY*, C. J., held "that the sound and true rule was, that if the contract when made was valid by the

THE STUDY OF CASES.

laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature or decisions of its courts, altering the construction of the law." In the case of *Taylor v. Ypsilanti*, 105 U. S. 72, this authority was reaffirmed, and also the case of *Douglass v. The County of Pike*, reported in 101 U. S. Rep. 677, in which it was held that "the true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." The following authorities hold the same rule: *Olcott v. Supervisors*, 16 Wall. 689; *Fairfield v. County of Gallatin*, 100 U. S. 52; *Supervisors v. U. S.*, 18 Wall. 71; *Gelpcke v. City of Dubuque*, 1 Wall. 206. Sutherland on Statutory Construction. § 319, says: "A judicial construction of a statute becomes a part of it, and as to rights which accrue afterwards it should be adhered to for the protection of those rights. To divest them by a change of the construction is to legislate retroactively. The constitutional barrier to legislation impairing the obligation of contracts applies also to decisions altering the law as previously expounded so as to affect the obligations of existing contracts made on the faith of the earlier adjudications."

In the case of *Geddes v. Brown*, 5 Phila. 180, the facts were, that in the year 1848 the legislature passed a law enlarging the power of married women over their property, and enabling them to deal with it in many respects as if they

were single. The Supreme Court of the State declared that under this law a married woman might convey or incumber property settled to her separate use. On the faith of this case, the mortgagee took his mortgage. By a subsequent decision of the Supreme Court the former decision was overruled, and it was held that property settled to the separate use of a married woman could not be alienated unless the power was conferred by the deed. The decision of the court in *Geddes v. Brown* was (and it is only the conclusion of the court that we cite) that a party who acts in accordance with the law as laid down by the highest tribunal in the State, while it is still law, shall not suffer because it is subsequently set aside and another and inconsistent rule substituted for it. The validity of the mortgage was upheld in the case cited.

Endlich on the Interpretation of Statutes, § 363, holds that a "judicial interpretation of a statute becomes a part of the statute law, and a change of it is, in practical effect, the same as a change of the statute." The author cites, with other cases to sustain the text, the case of *Geddes v. Brown*, *supra*.

It is contended that the reverse of these principles has been recognized, if not fairly held, in this State; and we have been referred to the cases of *Prince v. Prince*, 67 Ala. 565, and *Boyd v. The State*, 53 Ala. 608.

In the first case the contention was that, as the statute had not been construed when the mortgage which gave rise to the litigation was executed, "the grave doubt among members of the legal profession" as to the proper construction of the statute was a sufficient consideration to uphold a compromise of the mortgage debt. The court held that every one was required to know the proper construction of the statute, applying the maxim, *ignorantia facti excusat, ignorantia juris non excusat*. The question we are considering was not before the court in that case. In the latter case, *Boyd v. The State*, 53 Ala. 608, the present Chief Justice rendered the

THE STUDY OF CASES.

opinion, and on an application for a rehearing expressly called attention to the fact that a different principle controlled the conclusion of the court in the Boyd case from that held in the authorities referred to in this opinion, and declared that "in none of them was it decided or contended that any right existed or could be maintained which rested alone on a statute which the court pronounced unconstitutional." This case was affirmed by the Supreme Court of the United States, 94 U. S. 648, in which it was held that "the constitutionality of the Act was not drawn in question" by the previous decisions of the State court so as to necessitate a decision of that question.

The case of *Bibb v. Bibb*, 79 Ala. 444, though limiting the principle in its application to the subject-matter of the particular litigation, clearly recognized the rights of parties acquired under decisions of the Supreme Court, in the following pertinent language: "The quieting of litigation; the public peace and repose; respect for judicial administration of the law, and confidence in its reasonable certainty, stability, and consistency; and all considerations of public policy,—call for permanently upholding acts done, contracts executed, rights vested, and titles to property acquired, on the faith of decisions of the court of last resort."

Persons contracting are presumed to know the existing law, but neither they nor their legal advisers are expected to know the law better than the courts, or to know what the law will be at some future day. Any principle or rule which deprives a person of property acquired by him, or the benefit of a contract entered into, in reliance upon and strict compliance with the law in all respects as interpreted and promulgated by the court of last resort, at the time of the transaction, and no fault can be imputed to him in the matter of the contract, unless it be held a fault not to foresee and provide against future alterations in the construction of the law, must be radically wrong. Such a principle or rule of

law would clog business transactions, unsettle titles, and destroy all confidence in the decisions of the Supreme Court of the State. We hold the doctrine to be sound and firmly established by the decisions of the Supreme Court of the United States, and enunciated by many eminent text-writers, that rights to property, and the benefits of investments acquired by contract, in reliance upon a statute as construed by the Supreme Court of the State, and which were valid contracts under the statute as thus interpreted, when the contract or investments were made, cannot be annulled or divested by subsequent decisions of the same court overruling the former decisions; that as to such contracts or investments, it will be held that the decisions which were in force when the contracts were made, had established a rule of property, upon which the parties had a right to rely, and that subsequent decisions cannot retroact so as to impair rights acquired in good faith under a statute as construed by the former decisions. The application of these principles upholds the validity of the mortgage as shown by the pleadings, and leads to an affirmance of the decision of the lower court.

*Affirmed.*¹

¹ See §§ 53, 54, 66, 75-78, 84, 93-96, 101. Cf. *Woodruff v. Woodruff*, 52 N. Y. 53 (1873); *Henderson v. Folkestone Waterworks Co.*, 1 Times L. R. 329 (Q. B. D. 1885.)

APPENDIX I.

REGNAL YEARS.

THE English statutes are cited by the reign and the year of the reign. So are the cases in the Year Books. For other purposes also there are frequent references to the regnal years. Hence a table of the regnal years is here inserted. The date following each sovereign's name is the date on which the first year of the reign is officially considered to have begun.

Tables in common use often differ materially from the table here given. The explanation of many differences is that for historical purposes it is customary to consider each reign, in the absence of a clearly marked interregnum, as beginning simultaneously with the ending of the preceding reign, whereas for official and legal purposes the early reigns were usually reckoned as beginning at the date of coronation, or of proclamation, or of some other formal assertion of sovereignty, and only lately has the beginning of a reign been officially treated as identical with the termination of its predecessor. The table here given attempts to conform to the official custom of the several reigns.¹

Until Jan. 1, 1752, the legal year and the ecclesiastical year began on March 25, although the historical year and the commercial year began on Jan. 1.² Consequently before 1752 dates between Dec. 31 and March 25 are here written in accordance with each of the systems.

¹ The reasons for each date are given in Bond's Handy-Book for Verifying Dates, 273-295.

² St. 24 Geo. II. c. 23; Bond's Handy-Book for Verifying Dates, xvi-xxvii.

APPENDIX I.

William I., Oct. 14, 1066.	Henry VIII., Apr. 22, 1509.
William II., Sept. 26, 1087.	Edward VI., Jan. 28, 1546-7.
Henry I., Aug. 5, 1100.	Mary, ⁸ July 6, 1553.
Stephen, Dec. 26, 1135.	Elizabeth, Nov. 17, 1558.
Henry II., Dec. 19, 1154.	* James I., Mar. 24, 1602-3.
Richard I., Sept. 3, 1189.	Charles I., Mar. 27, 1625.
John, May 27, 1199.	The Commonwealth, Jan. 30,
Henry III., Oct. 28, 1216.	1648-9
Edward I., Nov. 20, 1272.	Charles II., ⁴ Jan. 30, 1648-9.
Edward II., July 8, 1307.	James II., Feb. 6, 1684-5.
Edward III., Jan. 25, 1326-7.	William and Mary, ⁶ Feb. 13,
Richard II., June 22, 1377.	1688-9
Henry IV., Sept. 30, 1399.	Anne, Mar. 8, 1701-2.
Henry V., Mar. 21, 1412-3.	George I., Aug. 1, 1714.
Henry VI., ¹ Sept. 1, 1422.	George II., ⁶ June 11, 1727.
Edward IV., ² Mar. 4, 1460-1.	George III., Oct. 25, 1760.
Edward V., Apr. 9, 1483.	George IV., Jan. 29, 1820.
Richard III., June 26, 1483.	William IV., June 26, 1830.
Henry VII., Aug. 22, 1485.	Victoria, June 20, 1837.

¹ Although Henry VI. was deposed March 4, 1460-1, and was restored Oct. 9, 1470, his regnal years after his restoration are reckoned as if there were an unbroken series from the original beginning of his reign to his final deposition, April 14, 1471.

² The regnal years of Edward IV. after his restoration are reckoned precisely as if the reign had not been interrupted by the temporary restoration of Henry VI.

³ Philip and Mary were married on July 25, 1554, and throughout the remainder of the reign a new and somewhat confusing computation of regnal years was used, the years of Philip being combined with the years of Mary. Thus the time from July 25, 1554, to July 5, 1555, was 1 and 2 Ph. & M. From July 6, 1555 to July 24, 1555, was 1 & 3 Ph. & M. From July 25, 1555, to July 5, 1556, was 2 and 3 Ph. & M. And so on. Bond's Handy-Book for Verifying Dates, 287, 401.

⁴ Although the Commonwealth lasted for more than eleven years, namely, from the death of Charles I. on Jan. 30, 1648-9, to the restoration of Charles II. on May 29, 1660, the official computation of Charles II.'s regnal years ignores the Commonwealth.

⁵ Mary died Dec. 28, 1694. Thereafter the regnal years of William III continued to be reckoned from Feb. 13, 1688-9.

⁶ By St. 24 Geo. II. c. 23 it was enacted that the day following Sept. 2, 1752, should be reckoned Sept. 14. The Gregorian Calendar.

APPENDIX II.

TERMS OF COURT.

IN English common-law courts there were formerly terms, named from certain ecclesiastical festivals. As decisions from the time of the Year Books almost to the present day are often designated by the term, the following table will be a convenience:—

HILARY TERM,

before 1831, began Jan. 23 or 24, ended Feb. 12 or 13;
1831-1875, began Jan. 11, ended Jan. 31.

EASTER TERM,

before 1831, began seventeen days after Easter Sunday, ended twenty-six days later, — consequently began Apr. 8 to May 12, ended May 4 to June 7; 1831-1875, began Apr. 15, ended May 8.

TRINITY TERM,

1264-1540, began sixty-six days after Easter Sunday, ended twenty-one days later, — consequently began May 27 to June 30, ended June 17 to July 21; 1541-1830, began sixty-one days after Easter Sunday, ended nineteen days later, — consequently began May 22 to June 25, ended June 10 to July 14; 1831-1875, began May 22, ended June 2.

MICHAELMAS TERM,

before 1641, began Oct. 9 or 10, ended Nov. 28 or 29; 1641-1751, began Oct. 23 or 24, ended Nov. 28 or 29; 1752-1830, began Nov. 6 or 7, ended Nov. 25; 1831-1874, began Nov. 2, ended Nov. 25.¹

or New Style, being thus finally legally recognized, the effect as to the regnal years was that 26 Geo. II. ended on June 21, and that the subsequent years of Geo. II. began on June 22. Bond's Handy Book for Verifying Dates, xx-xxvii, 292, 437.

¹ For further details as to the English terms, see Spelman on Law

APPENDIX II.

On November 1, 1875, the English terms ceased by reason of the Judicature Acts, but under rules of court there continued to be sittings designated by the ancient names.¹

In American courts the terms are named from the months in which they begin. In many courts there is but one annual term. Thus the Supreme Court of the United States now has only the October term. As a term may continue into another month, and even into another year, confusion sometimes results. Thus the case of *Scott v. Sandford*, 19 How. (U. S.) 393, which in the report properly appears as a decision of December term, 1856, was really decided in 1857.

Terms, 32-49; Bond's Handy-Book for Verifying Dates, 173-181; 3 Stephen's Com. (8th ed.), 498-503. The abbreviations for the terms are: H. or Hil., E. or Pasch., T. or Trin., M. or Mich.

¹ Supreme Court of Judicature Act, 1873, § 26; The Rules of the Supreme Court, 1883, Order LXIII, rule 1; Wilson's Judicature Acts (5th ed.), 2, 38, 555.

APPENDIX III.

ABBREVIATIONS.

A FEW lawyers closely approach pedantry in insisting upon the use of only such abbreviations as have been most approved by custom, and in denouncing any one who uses a heterodox abbreviation, or who writes a reference in full when an abbreviation is possible. Although the beginner may not approve such extreme views, he will find it to his advantage to become familiar with the most approved abbreviations; and indeed, if one is to use abbreviations at all, it seems preferable, for the sake of uniformity, to follow custom. Hence the most important abbreviations are collected here.

For the first volume of each set of the English Law Reports of the series beginning in 1866, and ending in 1875, the following abbreviations have the sanction of custom: L. R. 1 Ch., L. R. 1 Eq., L. R. 1 Q. B., L. R. 1 C. P., L. R. 1 Ex., L. R. 1 P. & M., L. R. 1 A. & E., L. R. 1 C. C., L. R. 1 H. L., L. R. 1 H. L. Sc., L. R. 1 P. C. For the series beginning in 1876 and ending in 1890, the following abbreviations for the first volumes are prescribed by the reports themselves: 1 Ch. D., 1 Q. B. D., 1 P. D., 1 App. Cas. The cases in the Court of Appeal are reported in the same volumes with the cases in the lower courts; and to indicate briefly the fact that a case is in the Court of Appeal some authors expand the abbreviations thus: Ch. Div., Q. B. Div., P. Div. For the series beginning in 1891, the announced abbreviations for the first volumes are these: [1891] 1 Ch., [1891] 1 Q. B., [1891] 1 A. C. If a case in Ch. or Q. B. is in the Court of Appeal, that fact is indicated by placing C. A. after the page; and if a case in A. C. is in the Privy Council, that fact is indicated by P. C., similarly placed.

APPENDIX III.

In the United States it is now the almost invariable custom to cite the current reports of a court of last resort by the name of the State. In Delaware the current common-law reports are cited as *Houst.*, and the equity reports as *Del. Ch.* In New Jersey the current reports are cited as *Vr.* and as *Dick. Ch. Rep.*; but outside the State there is a tendency to cite these reports as *N. J. L.* and *N. J. Eq.*, and also to assign the State name to the earlier New Jersey reports. In Pennsylvania the current reports are cited as *Pa.*; but the volumes before 97 *Pa.* are often cited by the reporters' names. The geographical mode of citation is so clear that it is only necessary to call attention to the following instances in which there are, or have been, series of similar names: *Colo.*, *Colo. App.*, *Ill.*, *Ill. App.*, *Ind.*, *Ind. App.*, *La.*, *La. Ann.*, *Md.*, *Md. Ch.*, *Mo.*, *Mo. App.*, *N. Y.*, *N. Y. Misc.*, *N. Y. Super. Ct.*, *Ohio*, *Ohio St.*, *Tex.*, *Tex. Civ. App.*, *Tex. Cr. App.* As the early reports in almost every State are still cited by the reporters' names, the student has to master a very considerable number of American abbreviations. Sometimes an abbreviation indicating the State is now written in parenthesis after the reporter's name; and this mode of citation, though too cumbersome for common use, is useful in the rare instances where two or more States have had reporters of similar names, and in briefs to be used in jurisdictions remote from the States to which the reports pertain, and in text-books for beginners.

The student should thoroughly familiarize himself with the abbreviations already given in this appendix, and also with the following citations of reports: ¹ *A. K. Marsh.*, *Allen*, *B. & Ad.*, *B. & Ald.*, ² *Barb.*, *B. & C.*, *Beav.*, *Bing.*, *Bing. N. C.*, *Black.*, *Blatch.*, *B. Mon.*, *B. & P.*, *Bro. C. C.*, *Bro. P. C.*, *B. & S.*, *Burr.*, *Bush*, *Caines*, *Caines' Cas.*, *Camp.*, *C. B.*, *C. B. N. S.*, *C. & J.*, *C. & K.*, *Cl. & F.*, *C. & M.*, *C. M. & R.*, *Co.*, ³ *Cow.*, *Cowp.*, *Cox*, *C. C.*, *C. & P.*, *Cranch*, *Cranch C. C.*, *Cro. Car.*, *Cro. Eliz.*, *Cro. Jac.*, *Cush.*, *Dall.*, *De G. F. & J.*, *De G. & J.*, *De G. J. & S.*, *De G. M. & G.*, *De G. & Sm.*, *Denio*, *Doug.*, *Dow*, *D. & R.*,

¹ And also, of course, with the approved abbreviations of all reports habitually cited in his own State.

² Until recently *B. & A.* was the accepted citation.

³ Until recently often cited as *Rep.*

APPENDIX III.

East, E. & B., E. B. & E., E. & E., Esp., Exch., Fed. Cas., Fed. R., F. & F., Gall., Gratt., Gray, Hare, H. Bl., H. & C., Hill, H. L. C., H. & N., Hob., Holt, Holt N. P., How., How. Pr., Jac., Jac. & W., J. J. Marsh., Johns., Johns. Cas., Johns. Ch., Jo. & Lat., Keb., Ld. Raym., Mac. & G., Madd., Met., Met. Ky., M. & G., Mod., Moo. P. C., Moo. P. C. n. s., M. & S., M. & W., Myl. & Cr., Myl. & K., Pet., Pick., Plowd., P. & W., P. Wms., Q. B., Rawle, Russ. & R., Salk., Sandf., Sandf. Ch., Saund., Sch. & Lef., Sid., Sim., Sim. n. s., Sim. & St., S. & R., Str., T. B. Mon., T. R., U. S., Vaugh., Vent., Vern., Ves. & B., Ves. Jr., Ves. Sr., Wall., W. Bl., Wend., Whart., Wheat, Willes, W. & S., Y. B., Y. & C. Ch., Y. & C. Ex., Yelv., Y. & J.¹

¹ The abbreviations in this appendix, and many other abbreviations, are explained in Soule's Lawyer's Reference Manual, and in any law publisher's catalogue.

INDEX.

	SECTION
ABBREVIATIONS. (See APPENDIX III.)	
ABRIDGMENTS, the old	110
AGREEMENT, fanciful etymology of the word	14 n.
ANALOGIES OF THE LAW, if disregarded, case may be overruled	53, 84, 94-96
kept in mind by searcher after doctrine established in reported cases	71, 72
kept in mind by courts when seeking doctrine not yet established	74, 77, 78, 84
ARGUMENTS OF COUNSEL, case not strong authority for points not touched in	42, 57
how reported	104
how prepared	122-131
(And see BRIEFS.)	
AUTHORITIES, how found	128
AUTHORITY, the kinds of	85, 97
imperative	86
the justification for imperative	87
persuasive	88
the justification for persuasive	89
distinction between imperative and persuasive	90
<i>quasi-</i>	91
the justification for <i>quasi-</i>	92
BACON'S ABRIDGMENT	110
BAD LAW, meaning of the phrase	77 n.
BIAS, as affecting judicial decisions	61
BREVITY OF OPINION may weaken value of case	44
BRIEFS in England and in America	119
statement of the case in	120
announcement of questions in	121
arguments in	122-127
finding authorities for	128
abstracting authorities for	129
selecting authorities for	130
revision of	131

INDEX.

	SECTION
BROOKE'S ABRIDGMENT	110
BURROW'S REPORTS	98, 106 <i>u.</i>
CASES, how to find the doctrine of. (See DOCTRINE.)	
unreported, not of high authority	37
reported in newspapers, not of high authority	38
doubted, not of high authority	53, 66
of first impression, not of high authority	60
<i>ex parte</i> , not of high authority	62
overruled, doubted, distinguished	66, 94-96
obsolete, state of society having changed	67
not followed, not of high authority	68
reportable	100
titles of	101
how discovered	128
CIRCUMSTANCES, peculiar, may affect decision	17, 61
essential and unessential must be distinguished	6-10, 71
CITATION, case is strengthened by subsequent	68
CODIFICATION has not progressed far	81
cannot wholly supersede unwritten law	82-84
COMBINING CASES, necessary if no case settles exact point	69
the method of	70-72
may be an unconscious process	71
the use of hypothesis in	72
COMPARING CASES, necessary whenever no one case settles exact point	69
is in effect an examination of cases with a view to finding an expected doctrine	72
COMYNS' DIGEST	110
CONSTRUCTION OF STATUTES, necessity for unwritten law in aid of	82-84
COURT can decide only the case before it	5
must follow a general rule	7
cannot make precedent by <i>dictum</i>	13-16
by ignoring possible doctrines can prevent cases from being authority as to them	17-19
case not of highest authority if decided by a divided	47
if not of last resort, decision not of highest authority	63, 88-90
even of last resort, not always highly esteemed	64
CRITICISM OF CASES, importance of	35
does not necessarily lessen weight	36, 59
the most common grounds of	36

INDEX.

	SECTION
CRITICISM OF CASES — <i>continued.</i>	
I. THE NATURE OF THE REPORT	
unreported cases	37
newspaper reports	38
reports of low standing	39, 98
inharmonious reports	40
scanty reports	41
II. THE ARGUMENTS OF COUNSEL	
thoroughness of argument	42
III. THE OPINION	
no reasons	43
no citation of authorities	43
brevity	44
<i>per curiam</i>	45
court's opinion by dissenting judge	46
divided court	47
judges giving different reasons	48
overlooking decisions in same jurisdiction	49
overlooking decisions in other jurisdictions	50
relying upon overruled cases	51
relying upon unsustained text-books	52
inartistic reasoning	53
local law	54
<i>dictum</i>	55
going off on another point	56
point not argued and not perceived	57
general language	58
criticisms less weighty in home jurisdiction	59
IV. THE NATURE OF THE QUESTION	
case of first impression	60
peculiar circumstances	61
political question	61
<i>ex parte</i>	62
V. THE COURT	
courts not of last resort	63
courts not esteemed	64
courts not familiar with subject	64
courts often granting rehearings	65
VI. SUBSEQUENT STATE OF THE LAW	
case overruled,	66
case obsolete	67
case not cited	68
DECIDING CASES by established doctrines	74
by new doctrines	74
(See also GROWTH OF THE UNWRITTEN LAW.)	

INDEX.

	SECTION
DECISION, meaning of word	14 n.
DECREE, meaning of word	14 n.
DEDUCTIVE REASONING	73 n.
DEPENDENT PROPOSITIONS	22, 26
DICTA, how to detect	11, 13, 16, 55, 56
weight of	13-16, 55, 56, 59, 68
useful as guides	72
have <i>quasi</i> -authority	91, 92
DIGESTS, the old abridgments or	110
the later English	111
American	112
special	113
general plan of	114
classifications in	115
form of paragraphs in	34, 116
order of paragraphs in	117
various details as to	118
DISSENTING OPINIONS, the weight of a decision as af-	
fected by	47
should be reported	107
DISTINGUISHING CASES	58
DIVIDED COURT	47
DOCTRINE OF A CASE,	
how to ascertain the doctrine	4-26, 69-72
only the case at bar can be decided	5, 6
court must follow a general rule	7
four propositions in every case	9
a test for any supposed doctrine	11, 12
the words of the court cannot establish an unnecessary	
doctrine	13-16
only a doctrine consciously or unconsciously in the	
mind of the court can be established	17-19
summary of the keys to the doctrine	20
essential marks of the doctrine	21
more than one doctrine	22-26, 56
combining cases	69-71
comparing cases	72
DOCTRINES, ESTABLISHED, how applied	73
DOCTRINES, NEW, how created	74-79
growth of unwritten law by	74-75
whether created by judicial legislation	76
lawyers' view	77
analytical jurists' view	78
neither view essential	79
DOUBTED CASES, value of	53, 66

INDEX.

	SECTION
ELASTICITY of unwritten law	84, 93-96
ERROR, one enough, if material	5, 25, 26, 56
ESSENTIAL CIRCUMSTANCES must be separated from unessential ones	6, 8-10
EX PARTE LITIGATION does not create precedents of high authority	62
FACT	I
FAMILIAR DOCTRINES often not expressed by the court though kept in mind	17, 28
often omitted by counsel	124
FIRST IMPRESSION, cases of, not of high authority	60
cases of, how decided	74
FITZHERBERT'S ABRIDGMENT	110
FORMULA for strong case on two points	26 n.
for weak case on two points	26 n.
GENERAL LANGUAGE, force of	16, 17, 19, 58
GROWTH OF THE UNWRITTEN LAW, need of	74, 75
views as to mode of	76
lawyers' view as to	77
analytical jurists' view as to	78
difference in views unimportant for the purposes of this volume	79
HEAD-NOTES, weight of, if made by reporters or by judges	27
contents of	28, 102
forms of	29-33
various uses of	34, 102, 129
HELD, meaning of word	29
HYPOTHESIS, in law as in other sciences	72
HYPOTHETICAL CASES, not within jurisdiction of courts	5
consciously or unconsciously imagined by counsel and court	6, 71
IMPERATIVE AUTHORITY	85-87, 90, 93, 97
(And see AUTHORITY.)	
INARTISTIC REASONING may cause case to be disre- garded	53, 66, 93-96
INDEPENDENT PROPOSITIONS	22, 23, 26
INDEX-DIGESTS	34
INDUCTIVE REASONING	70, 72
JUDGE-MADE LAW	75-78
(And see GROWTH OF THE UNWRITTEN LAW.)	

INDEX.

	SECTION
JUDGES as advisers of other departments of government . . .	5, 62
JUDGMENT, meaning of word	14 n.
does not show conclusively the doctrine of the case . . .	17
how reported	108
JUDICIAL LEGISLATION. (See GROWTH OF THE UNWRITTEN LAW.)	
JUDICIUM, Coke's etymology of the word	14 n.
JURISDICTION OF COURT is confined to the exact case . . .	5
JUSTICE AND LAW	74, 77, 78, 84, 94-96
LANGUAGE OF THE COURT as affecting proposition of case	17-19
(See also DICTA, DOCTRINE OF A CASE, OPINION, REASONS GIVEN.)	
LAW AND FACT	1
LAPSE OF TIME may render a case obsolete	67
LEGISLATION, JUDICIAL	74-79
(See GROWTH OF THE UNWRITTEN LAW.)	
LOCAL LAW as affecting value of cases	54
LOGIC AND LAW,	
major and minor premises	9 n.
syllogisms and the doctrine of a case	22, notes
induction	70
hypothesis	72 n.
deduction	73 n.
LOWER COURTS, value of decisions by	63, 88-90
MAJOR PREMISE	9 n., 22 n., 73 n.
MIND OF THE COURT, case not authority for doctrine not consciously or unconsciously in the . . .	17-21, 57
MINOR PREMISE	9 n., 73 n.
NECESSARY PROPOSITIONS. (See DOCTRINE OF A CASE.)	
NEW DOCTRINES, how obtained	74
(See GROWTH OF THE UNWRITTEN LAW.)	
NEWSPAPER REPORTS, value of	38
OBITER DICTA, meaning of phrase	13
(See DICTA.)	
OBJECTIONS TO CASES, most frequently made . . .	36-68
(See CRITICISM OF CASES.)	
OBSOLETE CASES	67
OFFICIAL REPORTS	109
OPINION,	
what it contains	13
dicta not authoritative	13

INDEX.

	SECTION
OPINION — <i>continued.</i>	
necessary propositions not called <i>dicta</i>	14
case establishes doctrine though there be no opinion	15
the very words not the doctrine of a case	16
the words show that certain doctrines were in the mind	
of the court	17
and others not	18, 19, 57
if relying on several points, case may be of less	
authority	25, 26, 56
giving no reasons, weakens case	43
brevity of, weakens case	44
<i>per curiam</i> , weakens case slightly	45
of court by dissenting judge, weakens case	46
dissenting, sometimes weakens case	47
how reported	105-107
by the majority of the court	106
by the minority of the court	107
OVERRULED CASES, case relying on, of slight authority	51
not of authority	66, 86
OVERRULING CASES, reasons for	53, 84, 94-96
process usually gradual	53, 66, 75
 PECULIAR CIRCUMSTANCES, weight of case involv-	
ing	17, 61
PER CURIAM OPINION, weight of	45
PERSUASIVE AUTHORITY	85, 88-90, 97
(And see AUTHORITY.)	
POLITICS, weight of case involving	61
PRECEDENT, for what doctrine a case is	6, 7, 11, 12, 15, 19, 21, 91
(See also DOCTRINE OF A CASE.)	
PREJUDICE, as affecting judicial decisions	61
PREMISES. (See LOGIC.)	
PROPOSITION OF A CASE. (See DOCTRINE OF A CASE.)	
PUBLIC POLICY, views change as to	67, 84, 93-96
 QUASI-AUTHORITY	
(And see AUTHORITY.)	85, 91, 92, 97
QUESTION, weight of case involving more than one	23-26, 56
weight of case turning on unusual	64
 RATIO DECIDENDI, what is	
(See also DOCTRINE OF A CASE.)	12
REASONING, the basis of decision, in order to prevent arbi-	
trary judgments	17, 87, 98

INDEX.

SECTION

REASONING — *continued.*

if contrary to analogies of law, case may be over-ruled	53, 66, 93-96
is the same in all jurisdictions	74, 88-90
is by lawyers deemed capable of bringing all new cases within old doctrines	77
is historical, analogical, or moral	77, 78
is said to be the life of the law	84

REASONS GIVEN by court are not necessarily the doctrine

of a case	13-17
may prevent the deduction of a possible doctrine.	18
especially when two or more points are involved, and either is enough	25, 26, 56
if none given, case of diminished authority	41, 43, 44
if judges give different reasons, doctrine is not clear	48
inartistic reasons may cause case to be overruled	53, 66, 93-96

(See also DOCTRINE OF A CASE.)

REGNAL YEARS. (See APPENDIX I.)

REHEARINGS as affecting value of cases	65
--	----

REMOTE JURISDICTIONS.	64
-------------------------------	----

REPORTABLE CASES.	100
---------------------------	-----

REPORTERS' DUTIES	99-109
-----------------------------	--------

REPORTS described	I, 98-109
-----------------------------	-----------

distinguished from trials	I
some of low standing	39, 98
inharmonious	40
scanty	41
the earliest	98
the purpose of	99
selection of cases for	100
titles of cases in	101
head-notes for	102
statements of facts for	103
abstracts of arguments for	104
abstracts of opinions for	105-107
majority opinions in	106
dissenting opinions in	107
memoranda of judgments in	108
official	109

RES ADJUDICATA	85 n.
--------------------------	-------

REVERSED CASES, value of	65, 86
------------------------------------	--------

distinguishing from overruled cases	86 n.
---	-------

REVERSING lower court, weight of judgment	25, 26
---	--------

ROLLE'S ABRIDGMENT.	110
-----------------------------	-----

INDEX.

	SECTION
SCIENCE, methods of	70, 72 n., 73 n.
(See also LOGIC AND LAW.)	
SEMBLE, meaning of word	29 n.
STARE DECISIS	53, 84, 87, 90, 93-97
STATEMENTS OF FACTS by reporters	103
by counsel	120
STATHAM'S ABRIDGMENT	110
STATUTES, cases turning on	54
supplemented by decisions	82-84
construction of	82-84
STRONG CASE on two points, formula for	26 n.
SUSTAINING lower court, value of decision	24, 26
SYLLABUS. (See HEAD-NOTES.)	
SYLLOGISM. (See LOGIC AND LAW.)	
TABLES OF CASES, uses of	118, 128
TERMS OF COURT. (See APPENDIX II.)	
TEST for supposed proposition of a case	11, 15
TEXT-BOOKS, not authority of highest order	13, 52, 91, 92
are valuable guides to law	71-73, 80, 84 n., 91, 92
TITLES OF CASES	101
TRIALS, volumes of	I
UNEXPRESSED DOCTRINES may be established by a case,	
if in mind of court	15, 17, 57
UNIFORMITY OF DECISION, necessity for	6, 7, 53, 85-98
UNNECESSARY PROPOSITIONS, case is not strong autho-	
rity for	15
UNWRITTEN LAW, development of	74-79
(See also GROWTH OF THE UNWRITTEN LAW.)	
bulkiness of	80
importance of	81
codification of	81-84
supplementing written law	82-84
VINER'S ABRIDGMENT	110
WEAK CASE on two points, formula for	26 n.
WORDS of the court, weight of	13-21
(See also DICTA, DOCTRINE OF A CASE, OPINION, REASONS GIVEN.)	
YEAR BOOKS	98
YEARS, REGNAL. (See APPENDIX I.)	

med
of

AD AWC YDe
The study of cases.

Stanford Law Library



3 6105 044 012 222

